DOCUMENT RESUME

ED 446 389 EA 030 683

TITLE	CASDA Annual School Law Conference Proceedings (12th, Latham, NY, July 17, 1997).
INSTITUTION	Capital Area School Development Association, Albany, NY.
PUB DATE	1997-09-00
NOTE	134p.; For Thirteenth Annual, see EA 030 682.
AVAILABLE FROM	Capital Area School Development Association, The University at Albany, 135 Western Avenue, Husted Hall 211, Albany, NY 12222 ($18).
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	MF01/PC06 Plus Postage.
DESCRIPTORS	*Disability Discrimination; *Educational Legislation; Elementary Secondary Education; *Labor Relations; Public Schools; *Sex Discrimination; *Sexual Harassment; *Special Classes; Student Rights; Tenure
IDENTIFIERS	*Title IX Education Amendments 1972

ABSTRACT

The Capitol Area School Development Association Conference was held in July 1997. These proceedings include the following presentations: "Challenges to Teacher Tenure--A Debate"; "Recent Decisions of the Commissioner of Education"; "Title IX and Its Implications for School Districts"; "Current Developments in Labor and Employment Law"; "Recent Developments under the Public Employees' Fair Employment Act"; "Student Searches and Seizures"; and "ADA: Disability and Reasonable Accommodation." (DFR)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 446 389

CASDA
Twelfth Annual School Law Conference

July 17, 1997

CENTURY HOUSE

LATHAM, NY

Capital Area School Development Association
School of Education
The University at Albany
135 Western Avenue
Husted 211
Albany, New York 12222

518-442-3796
518-442-3746 (Fax)

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY
N. Armlin
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
1

EA 030683

BEST COPY AVAILABLE

Copies of this publication may be obtained from:

Capital Area School Development Association
The University at Albany
135 Western Avenue
Husted Hall - 211
Albany, New York 12222

Price $18.00
Payment must accompany order.

Twelfth Annual School Law Conference

Proceedings of the Twelfth Annual School Law Conference sponsored by the Capital Area School Development Association (CASDA)

July 17, 1997
Century House
Latham, New York

A publication of the
Capital Area School Development
Association
School of Education
The University at Albany
September, 1997

Capital Area School Development Association
Executive Committee 1997-98

1995-98
Lee Bordick
Superintendent
Lansingburgh Central School

Donald Lomanto
Superintendent
Gloversville City Schools

Leslie Loomis
Superintendent
Bethlehem Central School

Thomas Markle
Superintendent
Amsterdam City Schools

1996-99
Chair
Linda Gush
Superintendent
Greenville Central School

Vice Chair
Thomas Brown
Superintendent
South Colonie Central School

John MacFadden
Superintendent
Saratoga Springs City Schools

Martin Ruglis
Superintendent
Schoharie Central School

1997-2000
Audrey Farnsworth
Superintendent
Rotterdam-Mohonasen Central School

Sister Mary Jane Herb
Superintendent
Albany Diocese Schools

Ann Myers Nepo
District Superintendent
Questar III

Sherman Parker
Superintendent
Lake George Central School

John Stewart
Superintendent
Poland Central School

For the University
Judy Genshaft
Vice President for Academic Affairs

James Fleming
Acting Dean
School of Education

EX-OFFICIO
Daniel L. Wulff
Professor, Biological Sciences
College of Arts and Sciences

Raymond O'Connell
Department of Educational Administration and Policy Studies

Richard Bamberger
Executive Director

Dee Warner
Associate Director

Arlene Sampson
Assistant Director

Karen Dockal
Office Manager

Joan Jurevis
Secretary

Preface

The Capital Area School Development Association (CASDA) sponsored its Twelfth Annual School Law Conference on Thursday, July 17, 1997. The conference fulfills a need in the Greater Capital Region for school board members and administrators who desire to maintain and improve their knowledge in the area of school law. As a further service, CASDA is presenting these proceedings of the Twelfth Annual School Law Conference for each participant who attended the conference.

We thank the presenters at the School Law Conference for supplying us with a full text of their presentations. In the interest of economy and time, the papers have been reproduced as typed and presented to us. We thank the attorneys for their presentations on July 17 and for the written texts.

We are happy to present these proceedings to the participants at the conference as another service of CASDA.

Richard Bamberger
Executive Director
Capital Area School
Development Association

Table of Contents

Page

Preface 1

Table of Contents 2

Presentations:

Challenges to Teacher Tenure - A Debate 3
Jay Girvin, Esq.
Ruberti, Girvin and Ferlazzo
Ivor Moskowitz, Esq.
Associate General Counsel,
New York State United Teachers

Recent Decisions of the Commissioner of Education . . 15
Joseph Porter, Esq.
Deputy Counsel
New York State Education Department

Title IX and Its Implications for School Disticts . . 27
Heather Diddel, Esq.
Whiteman Osterman and Hanna

Current Developments in Labor and Employemnt Law. . . 73
Melvin Osterman, Esq.
Whiteman Osterman and Hanna

Recent Development under the Public Employee's Fair Employment Act. 85
Monte Klein, Esq.
Director, Improper Practices and Representation
PERB

Student Searches and Seizures 95
Beth Bourassa, Esq.
Whiteman Osterman and Hanna

ADA: Disability and Reasonable Accommodation 125
Liesl Zwicklbauer, Esq.
Roemer Wallens & Mineaux, LLP

RUBERTI, GIRVIN & FERLAZZO, P.C. *Attorneys at Law*

120 STATE STREET • ALBANY, NEW YORK 12207-2829
(518) 462-0300 • FAX (518) 462-5037
E-mail Rgflaw@global2000.net

E. MICHAEL RUBERTI
JAMES E. GIRVIN
SALVATORE D. FERLAZZO
KRISTINE AMODEO LANCHANTIN
JEFFREY D. HONEYWELL

LAWRENCE D. COOPER

GREGG T. JOHNSON
JOHN J. TOY, JR.
PATRICK J. McKENNA
KATHY ANN WOLVERTON
CHRISTOPHER P. LANGLOIS
BRUCE I. KOPP

OF COUNSEL
MARY HELEN MOSES
ELAINE M. PERS
JAMES A.P. McCARTHY
M. CORNELIA CAHILL

Capital Area School Development Association

Challenges to Teacher Tenure, A Debate

James E. Girvin, Esq.
Ruberti, Girvin & Ferlazzo, P.C.
120 State Street
Albany, New York 12207-2829

School Law Conference

Thursday, July 17, 1997

BEST COPY AVAILABLE

TENURE REFORM ISSUES: ARGUMENTS/CASE LAW

I. TEACHERS MAY KNOWINGLY AND FREELY WAIVE RIGHTS TO TENURE WHEN APPOINTED TO A TEACHING POSITION.

- Matter of Feinerman v. BOCES, 48 N.Y.2d 491 (1979).

  BOCES teacher entered into a series of one year contracts which stated "there is no tenure with this position". The New York Court of Appeals ruled that considerations of public policy did not preclude BOCES from employing the teacher for a limited term in a position which carried no tenure rights. The Court reasoned (1) it was clearly demonstrated that the teacher voluntarily, knowingly and openly waived the right to be appointed to a three-year probationary appointment in a tenure bearing position; (2) no evidence was presented of coercion or duress in entering the employment contracts; (3) Education Law §3014 does not contain a provision which prevents a teacher from knowingly and voluntarily waiving a three-year probationary appointment therein; (4) there is no indication in the Legislative history of that statute of intent to forbid BOCES from engaging the services of a teacher for a limited term in a non-tenure bearing position if same was voluntarily consented; and (5) the terms of the collective bargaining agreement between the bargaining representative of the teacher and the BOCES specifically provided that the position occupied by the teacher was non-tenure bearing.

- Abramovich v. Board of Education of Village Central School District #1, 46 N.Y.2d 450 (1979).

  Tenured teacher may, as part of a stipulation in settlement of disciplinary proceedings against him/her, waive his/her continued right to the protections afforded by §3020-a of the Education Law if such waiver is made freely, knowingly and openly without coercion. Here, the teacher agreed to waive protections afforded by §3020-a in the future following careful and counseled negotiations between the parties (which included "exhaustive discussion among counsel for the board, [the teacher], his lawyer, the hearing officer, and the teachers' union representative") and there was no claim of Board of Education induced duress. The Court reasoned that "when a waiver is freely, knowingly, and openly arrived at, without taint of coercion or duress, the sturdy public policies or underpinnings of §3020-a are not undermined." The Court also stated that Education Law §3020-a "contains no express provision preventing a teacher from waiving its benefits", and that "§3020-a is not so sacrosanct as to be impervious to waiver".

- Yastion v. Mills, 229 A.D.2d 775 (3rd Dep't 1996), upholding Commissioner of Education Decision in Matter of Yastion, Decision # 13,176 (1994).

  Guidance counselor signed salary agreement with Ulster BOCES for three successive years which contained express provisions stating that tenure was not applicable to the position. The position was "a new, temporary position", and nothing indicated that the guidance counselor was filling a permanent vacancy. The Commissioner of Education relied upon Matter of Feinerman, and found that the guidance counselor knowingly and freely waived any expectation of tenure and "willingly accepted appointment to a position which expressly carried with it no tenure rights." The Supreme Court concluded that the Commissioner's decision had a rational basis, and the Appellate Division affirmed.

BUT SEE:

- Costello, et. al., v.Board of Education of East Islip Union Free School District, (Supreme Court, Nassau County, March 24, 1997).

  Supreme Court ruled that district could not require newly hired teachers to execute waivers of the tenure law in accepting employment, distinguished Feinerman as being a BOCES case involving one individual rather than a group of teachers to fill positions in a union free school district, and reasoned:

  > The [district's] stated purpose in promulgating the resolution [regarding waivers] was to improve education by removing the respondent and its teachers from the purview of the Education Law tenure provisions; however, this goal can be achieved only by the Legislature's amendment of the Education Law, and not by an act of a local Board of Education. There is no ruling of any Court offered by the [district] that supports the blanket eradication of the safeguards provided in Education Law that the respondent seeks.

- Matter of Conetta et. al., v. Board of Education of Patchogue-Medford Union Free School District, 165 Misc. 2d 326 (Supreme Court, Nassau County, June 8, 1995).

  Supreme Court ruled that Board of education could not "withhold tenure at the end of a probationary period for fiscal reasons unrelated to the qualifications of those seeking tenure." Board's refusal constituted abuse of discretion. However, court acknowledged that waiver of a probationary appointment "knowingly and freely made" will result in tenure being withheld "to one who is otherwise qualified in all other respects."

- Matter of Dworkin, 36 Ed. Dept. Rep. 314 (1997).

  Board of education members who abstained from tenure vote on the basis of their "philosophical objection to the current system for granting tenure" could be found to have neglected their duty to evaluate the merit and fitness of the particular teacher recommended for tenure. Those board members were therefore not entitled to certificate of good faith statutory indemnity under Education Law §3811(1).

II. AGREEMENTS ENTERED INTO WITH TEACHERS WHERE TENURE RIGHTS ARE WAIVED SHOULD INCLUDE DUE PROCESS PROTECTIONS FROM ARBITRARY TERMINATION, PERHAPS ANALOGOUS TO CIVIL SERVICE LAW §75

- Legislative history of tenure statutes reveals that Education Law statutory tenure is based in job protection for public employment, not in academic freedom.

- In Feinerman, supra, the Court of Appeals wrote that the tenure statutes were "promulgated by the Legislature in furtherance of the purpose to attract qualified educators and provide teachers with job security". (emphasis supplied). The Court also wrote, when explaining the Court's Abramovich decision, that the Education Law §3020-a was grounded in "strong public policy considerations in that it safeguards tenured teachers from official or bureaucratic caprice by delineating a method whereby tenured teachers are to be removed". (emphasis supplied). In Matter of Abramovich, supra, the Court wrote that "§3020-a and the regulations promulgated thereunder by the Commissioner of Education ... attempt to harmonize the method of removing tenured teachers with the dictates of procedural due process." Again, focusing on the procedural due process contained in Education Law §3020-a, the Court reasoned that "the shield of §3020-a is not likely to be put aside. That does not mean that it is never waivable. For, when a waiver is freely, knowingly and openly arrived at, without taint of coercion or duress, the sturdy public policy underpinnings of §3020-a are not undermined."

Based on the foregoing, it is arguable that if an agreement were drafted where a teacher waives his/her right to the due process protections of the tenure statues, and substitutes those protections with another form of due process, then the agreement would "provide the teacher with job security" and delineate the method whereby (s)he would be removed. The very purpose of the tenure laws would be intact, with the process by which that purpose is accomplished substituted by the parties. Civil Service Law §75 seems a logical substitute for Education Law §3020-a.

III. GUARANTEES OF TENURE CONFLICT WITH THE SED PROMULGATED GOALS OF IMPROVING EDUCATIONAL RESULTS.

- In the New Compact for Learning, the New York State Education Department (SED) has placed improving educational results as the paramount mission in education. The antiquated system of tenure, which provides procedural due process, has evolved to place substantive restrictions and limitations on a school district's rights to determine continuing employment qualifications.

  Qualifications required for teaching appointments are not mandatory subjects of negotiations. Even with the recent amendments to Education Law §3020-a, disciplining teachers in accordance with Education Law §3020-a remains cost prohibitive. Education Law §3020-a therefore prohibits districts from insuring that qualified teachers work toward SED's stated educational goal. Thus, agreeing upon a fair procedural due process which is separate and apart from the tenure statute may be an attractive argument given the realities of financial constraints which face school districts, and the excessive cost in attempting to work within Education Law §3020-a.

IV. MISCELLANEOUS THOUGHTS

- Tenure reform should focus on its grant/denial, not upon Education Law §3020-a.
  - Extend probationary time period to five years.
  - Require continuing education following the grant of tenure.
  - Require recertification following the grant of tenure at five year intervals.
  - Perhaps require outside evaluation (by SED or otherwise) of teacher performance before recommendation for tenure can be made to the Board of Education.

Can the tenure laws be modified? Obviously they can. New York's first tenure statute was implemented in 1917 and only affected New York City. In 1937, the law was expanded to cover union free school districts. In 1945, the laws affecting teacher tenure were amended to cover almost all public school teachers with some due process rights. The law was further amended in 1970 to provide for independent panels to make recommendations to school board on tenure charges; in 1977 the tenure laws were strengthened to give panels power to issue binding decisions. Finally, in 1994, the Legislature approved changes now encompassed in the present §3020-a law, providing for fairer and faster process, and including provisions for (1) pre-hearing discovery, (2) disclosure of penalties sought by school boards and (3) broader choices of penalties and remedies to hearing officers.

The results of the changes to §3020-a proceedings are salutary: (1) most hearings are decided within six months after initial charges are brought (see, "Discipline Without Delay," 1997 publication of New York State United Teachers. Requests for copies may be addressed to NYSUT's Media Relations/Communications Department); (2) discovery hearings provide opportunity to settle cases and such settlements are occurring either prior, during or after hearings are actually commenced; (3) hearing officers can now provide a much wider choice of remedies leading to a more remedial approach to teacher discipline; (4) teachers convicted of certain felony crimes involving drugs and/or physical or sexual abuse of a student may be suspended without pay.

While it is conceded that the Legislature can change the tenure laws, the question arises as to whether school districts themselves may change or eliminate tenure. Attempts by school districts to change our tenure laws have so far met with failure in the courts.

Where a board sought to recognize ad hoc tenure areas prior to 1974, the Court of Appeals in *Matter of Baer v. Nyquist*, 34 N.Y.2d 291 (1974) struck them down. In response to *Baer*, the Board of Regents and Commissioner promulgated Part 30 of the Regulations, effective August 1, 1974. In *Ricca v. Board of Education*, 47 N.Y.2d 385 (1979), the Court of Appeals struck down a board's action which would have extended a teacher's probationary period. The Court said at 47 N.Y.2d 391:

> "A school district may not avoid strict application of the statutory scheme for granting tenure to qualified and experienced teachers by the stratagem of unduly delaying formal appointment of a teacher to a position which the teacher is in fact already filling. The tenure system is not an arbitrary mechanism designed to allow a school board to readily evade its mandate by the creation of mechanical obstacles on a qualified teacher's trail to tenure [citing *Baer*]

Several recent cases have echoed *Ricca*. In *Matter of East Islip Teachers Assn. v. Board of Education, East Islip Union Free School District*, ___Misc. 2d ___, ___N.Y.S.2d ___ (Sup. Ct., Nassau County, 1997), the court annulled the actions of a board of education in requiring all new teachers hired in the District to sign a contract waiving their right to tenure. The court said, in part:

> "The respondent's stated purpose in promulgating the resolution was to improve education by removing the respondent and its teachers from the purview of the Education Law's tenure provisions; however, this goal can be achieved only by the Legislature's amendment of the Education Law, and not be act of a local Board of Education."

See, also, *Conetta v. Board of Education, Patchogue-Medford U.F.S.D.*, 165 Misc.2d 329, 629 N.Y.S.2d 640 (Sup.Ct., Nassau County, 1995), where a board denied tenure on philosophical and fiscal grounds to probationary teachers who had completed their probationary term. The court stated that a board is not free to refuse to administer the law; it has no discretion to refuse to determine tenure upon merit.

"CHALLENGES TO TEACHER TENURE"

Presentation to July 17, 1997 CASDA
Meeting by Ivor R. Moskowitz, Esq.
Associate General Counsel, New York
State United Teachers

Good morning, I am Ivor R. Moskowitz, Associate General Counsel for the New York State United Teachers. NYSUT is a labor union and service organization representing over three hundred thousand public employees, including some two hundred thousand teachers and school related personnel.

I am here on behalf of NYSUT and James R. Sandner, General Counsel for NYSUT to address today's topic - "Challenges to Teacher Tenure." I am told that this presentation will be part of a debate with Jay Girvin. Please be advised that all opinions expressed by me are my own and do not necessarily reflect the views of NYSUT.

To begin with, we should all have a common understanding of the definition of tenure. From my perspective it means the status conferred on probationary teachers either by specific award from a board of education or BOCES, or by acquiescence. *Matter of Marcus v. Board of Education*, 64 A.D.2d 475 (3rd Dept., 1978).

The statutory basis for tenure rests in various sections of the *Education Law* such as §3012 and §3014 whose express provisions require a Board to appoint teachers to a three year probationary period, or a two year period if the teacher has previously been appointed to tenure in another school district within the State and has not been dismissed from such other district for charged incompetency or misconduct, or as little as ~~a~~ one year period if a teacher has rendered two years of satisfactory prior service as a regular substitute (see, *e.g.*,*Education Law* §3012(1)(a)).

Appointment of a teacher to a probationary term does not guarantee that such teacher will receive tenure. The statute provides that the services of a probationary teacher may be terminated prior to the expiration of his or her probationary term. (See, e.g., §3012(1)(a)). Probationary teachers may be excessed from their employment pursuant to *Education Law* §§3013, 2585 and 2510 and placed on a preferred eligible list for seven years.

In order to obtain tenure, prior to the end of a probationary period, the superintendent of a school district or BOCES is required to notify such board of education or BOCES, in writing, of those persons found to be competent, efficient and satisfactory. (See, *e.g.*, *Education Law*§3012(2)).

Once tenure is attained, whether by affirmative vote of the employing board or by acquiescence, a teacher is entitled by statute to hold his or her position during good behavior and efficient and competent service. Such tenured teacher may not be removed except for cause after a hearing held pursuant to the due process procedures of *Education Law* §3020-a. (See, *e.g.*, *Education Law* §3012(2)(a).)

Having stated the above, it is fair to ask whether the tenure system should be insulated from change; that is, should the concept of tenure be immutable? If not, are there reasons for change, what should these changes be and, conversely, are there reasons against change.

Tenure was originally employed to remove politics and arbitrary and capricious actions as a basis for the discipline and/or dismissal of teachers. However, just as importantly, tenure was adopted to foster and protect academic freedom, free speech and inquiry. Tenure is not a guarantee of lifetime employment, tenured teachers may be disciplined and/or discharged for cause, but such discipline and discharge of tenured teachers does require a due process hearing prior to imposing a penalty.

As *Ricci, East Islip* and *Conetta* have held, challenges to teacher tenure after a probationary appointment will most probably fail on an individual district level. Challenges in the form of proposed legislation will almost certainly meet teacher union and other labor opposition. Their ultimate success is unknown. Proposals such as charter schools (private and public), five year renewable tenure (which isn't really about tenure at all, but rather a five year employment contract to a probationary status) abound.

The true challenges to tenure are those necessary to make the tenure system work; not to abolish tenure. Tenure does not constitute lifetime employment. Tenured teachers can be excessed, disciplined and fired. *Education Law* §3020-a has been amended and has considerably shortened disciplinary proceedings. Its purposes of protecting academic freedom and rewarding competent service are salutary. The true challenge to teacher tenure is for school districts to do what they are duty bound to do: administer, evaluate, coach, improve and lead. My opinion is that if school districts hire well, evaluate properly through the probationary period and work with staff to remedy any deficiencies, tenure will work.

IRM/ks
16159
cwa 1141

NEW YORK
THE STATE OF LEARNING
THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

DEPUTY COUNSEL

RECENT DECISIONS OF THE COMMISSIONER OF EDUCATION

Presented by

JOSEPH B. PORTER
Deputy Counsel
New York State Education Department

at

The Capital Area School Development Association's
Annual School Law Conference

July 17, 1997
Century House
Latham, New York

I. ADMINISTRATORS

A. Application of Eagelfeld, 36 Ed Dept Rep 186, Decision No, 13,696, 10/25/96

Petitioner sought removal of an assistant superintendent based on allegations of improper fiscal practices. The Commissioner found petitioner's allegations without merit but also clarified that Education Law §306 does not apply to assistant superintendents of school. Specifically, the Commissioner held that assistant superintendents are not officers of a school district but are employees and must be disciplined accordingly.

B. Appeal of Elmendorf, 36 Ed Dept Rep 308, Decision No. 13,733, 2/19/97

This appeal involved the termination of an administrator's services as building principal and denial of her appointment to a newly created position of assistant superintendent. The administrator was employed as building principal in 1990 and received tenure in 1992. In 1995, the board of education determined that the positions of curriculum coordinator and building principal would be abolished and replaced by the position of assistant superintendent. Although petitioner applied for the newly created position of assistant superintendent, she was not interviewed for the position and subsequently sought appointment under Education Law §2510. Based on the record, the Commissioner found that while some of petitioner's duties as building principal were similar to the duties of the newly created position the positions were not similar under Education Law §2510 since the assistant superintendent position required a higher level of certification than the building principal position. The fact that the petitioner in this instance happened to hold the higher level certification was not dispositive since the threshold issue was whether the positions were similar. The Commissioner did find that petitioner was entitled to a pre-termination hearing regarding her right to the newly created position since she had a colorable claim to that position under Education Law 2510.

II. ATHLETIC ELIGIBILITY

A. Appeal of a Student with a Disability, 36 Ed Dept Rep 39, Decision No. 13,647, 8/13/96

A student who has been deaf and mute since birth and communicates through sign language, had participated in interscholastic football for three years and wanted to participate during his senior year. However, he was not eligible because he turned 19 on August 24 and, under the Commissioner's regulations as they then read, a student was only eligible to participate in interscholastic sports until the age of 19, unless the student turned 19 on or after September 1. The regulation has since been amended to allow a student to participate until the close of the school year in which he/she turns 19.

B. Appeal of Board of Education, Spencerport Central School District, 36 Ed Dept Rep 49, Decision No. 13,651, 8/13/96

A student was a member of his high school's soccer team during his ninth and tenth grades. During the summer, he was exposed to toxic chemicals which resulted in progressive physical and mental problems. In his junior year, he joined the soccer team, but discontinued participation in October on his doctor's advice. Later that year, he withdrew from in-school courses and received home tutoring and counseling. Consequently, he repeated his junior year and again participated on the high school's soccer team. In the fall of 1996, the student wanted to play soccer in his senior year. However, Commissioner's regulations provide that a student is eligible for four consecutive seasons of a sport and that a pupil enters competition in a given year when the pupil is a member of the team and that team has completed at least one contest. Therefore, the student was not eligible to participate in soccer during his senior year because he had already entered competition for four consecutive seasons.

III. ATTENDANCE

A. Appeal of Pasquale, 36 Ed Dept Rep 290, Decision No. 13,727, 1/7/97

The Commissioner found the district's attendance policy to be arbitrary because it made exceptions for certain student absences. In addition, the Commissioner found the district's make-up policy to be overbroad in its application to non-disabled students. The Commissioner held that if a district allows a student the opportunity to make-up missed class work, that make-up must mitigate the loss of credit which would otherwise result from the student's absence.

IV. BOND PROPOSITION

A. Appeal of Friedman, 36 Ed Dept Rep ___, Decision No. 13,769, 5/22/97

School district residents challenged the form of a single proposition authorizing a $22 million tax to be used to reconstruct various buildings, parking lots and sidewalks, improve existing playground and recreational areas, purchase and install oil tanks, and purchase school buses. Petitioners contended that the district improperly included multiple objects and purposes within a single proposition to be presented to the voters for approval. The Commissioner found that the district's actions complied with the Education Law and Local Finance Law and were consistent with the interpretations of those statutes by the courts and previous commissioners. A board of education has broad discretion in determining the form of its propositions and the power rests with the voters to reject propositions not satisfactory to the majority.

V. BUDGET

A. Appeal of Citizens for Education, 36 Ed Dept Rep 12, Decision No. 13,637, 6/12/96

Petitioner appealed the newly seated board of education's decision to reduce the amount of a contingency budget adopted by the previous board of education. The Commissioner held that such reduction was within the power of the new board and that, because the board was able to maintain its educational program and meet its statutory and legal obligations under the reduced budget, the reduction was permissible.

B. Appeal of Shravah, 36 Ed Dept Rep 396, Decision No. 13,760, 4/21/97

This appeal addressed whether it is permissible for a board of education to enter into a contract with a firm for the preparation of the school district's budget, while the district is under a contingency budget. The Commissioner found that preparation of the district's budget is a central function of the district's administrative staff and of the superintendent of schools who is the chief executive officer of the district, and that existing staff were already available and being paid to prepare a budget for the district. The Commissioner held that it is improper for a board of education to require a district's taxpayers to pay twice for the same service while operating under a contingency budget, and that a board's determination to incur a new contractual obligation while under a contingency budget does not convert that contract into an ordinary contingent expense when existing district personnel can adequately perform the function required by the district. Accordingly, the contract at issue was found to be null and void because expenditures under the contract were a noncontingent expense.

VI. CLASS RANK

A. Appeal of Perino, 36 Ed Dept Rep 305, Decision No. 13,732, 2/5/97

After a two-year review process, a school board adopted a new class ranking policy and implemented the new policy beginning with the class of 1996. The petitioners argued that the board's decision to implement the policy with the class of 1996 retroactively penalized their children. The Commissioner held that there was no basis to determine that either the board's policy or its decision to implement the new policy with the class of 1996 was irrational or unreasonable.

VII. ELECTIONS

A. Appeal of Titus, 36 Ed Dept Rep 407, Decision No. 13,762, 4/21/97

The Commissioner annulled the results of a school district election where election inspectors had improperly declared certain ballots void. Under Education Law §2032(2)(e), when paper ballots are used, a blank space must be provided under the name of the last candidate so that voters may write-in a candidate's name. Upon inspection of the ballots, the Commissioner found that election inspectors had incorrectly declared 10 ballots void where voters had written in the name of a candidate but had not additionally placed a mark next to the name written in. The Commissioner observed that Education Law 2032(2)(e) specifically provides that writing in the name is sufficient to indicate a vote and that there is no requirement that the voter place a mark adjacent to the name under such circumstances. After recounting the ballots, the Commissioner annulled the previous election results and declared the write-in candidate a member of the board of education.

VIII. HEALTH SERVICE COSTS

A. Appeal of Board of Education of the Brighton Central School District, 36 Ed Dept Rep 381, Decision No. 13,755, 4/4/97

This appeal focused on the obligation of a school district (a "sending district") to pay for health services provided by another district when the sending district's students attend a nonpublic school in the other district. In this appeal, the students resided in school districts located outside Monroe County, but attended nonpublic schools in the Brighton district, which is a suburb of Rochester in Monroe County. The "sending districts" objected to the cost of the services they were billed by Brighton, claiming that the costs were substantially higher than costs incurred within their own districts. No contracts had been entered into as contemplated by Education Law §912. The decision collected and reviewed a number of older decisions, and upheld the right of Brighton to collect at the rate it had billed, since it had calculated costs in a manner approved in earlier decisions. The Commissioner rejected the argument that Brighton should be required to use some more sophisticated methodology to reduce the cost of services.

IX. RESIDENCY

A. Appeal of Elliott, 36 Ed Dept Rep 70, Decision No. 13,660, 8/26/96

Petitioners appealed the determination of the board of education that they and their children were not residents of the district. In this case, one of the petitioners was a pastor assigned to a parsonage outside the district. While petitioners admitted that they were physically present outside the district, they did not intend to change their residence and maintained a home and personal property in the district. The Commissioner found that in this situation, petitioners had not evidenced an intent to change their permanent residence, and a change of location to accommodate the pastoral duties did not constitute a legal change of residence.

B. Appeal of a Student with a Disability, 36 Ed Dept Rep 81, Decision No. 13,664, 8/28/96

In this case, the grandparents of a student with a disability appealed the district's determination that the student was not a resident of the district. The student's parents relinquished custody of the student in Oswego County Family Court. The record is clear that the student's parents were unsatisfied with the special education services provided by their district of residence. Since petitioners argued that they had not been given a fair review of the student's residence by the district, the matter was remanded for a hearing pursuant to 8 NYCRR 100.2(y) to determine the student's district of residence. When a district makes a determination regarding a student's residence upon admission to school, the procedures outlined in 8 NYCRR 100.2(y) are applicable.

C. Appeal of Ravix, 36 Ed Dept Rep 89, Decision No. 13,667, 8/28/96

Petitioners, the mother and stepfather of two students, appealed the determination of the board that they were not residents of the district. Petitioners made arrangements for the children to stay with their grandparents to accommodate work and graduate school schedules. Although these nontraditional arrangements were explained to the district, a residency review was conducted. The children's mother requested a Friday hearing date to accommodate her job as a nurse. When the district scheduled the hearing on Monday, the children's stepfather attended, but objected to the hearing being held without his wife. The Commissioner remanded the matter to the district for a hearing pursuant to 8 NYCRR 100.2(y) with the children's mother present.

X. SCHOOL RECORDS

A. Appeal of Greening, 36 Ed Dept Rep 394, Decision No. 13,759, 4/16/97

In this appeal, petitioner maintained that he was entitled to review school district records under Education Law §2116 notwithstanding the Freedom of Information Law (FOIL). The Commissioner found that although Education Law §2116 remained in effect after the adoption of FOIL, it still must be construed with FOIL. Therefore, the Commissioner held that a school district may reasonably require the public to follow its FOIL procedures in order to review and copy district records. Accordingly, the district did not deny petitioner access to records simply because it required petitioner to comply with its FOIL procedures.

XI. SHARED DECISION MAKING

A. Appeals of Zaleski and Gimmi, 36 Ed Dept Rep 284, Decision No. 13,725, 1/3/97

The president of the teachers' union and a teacher member of the district's curriculum committee brought two appeals alleging that the district failed to follow its shared decisionmaking plan with regard to two curriculum based programs. While the district's shared decisionmaking plan contained permissive language concerning curriculum matters, the plan could not require that the district delegate those matters to shared decisionmaking teams. The Commissioner reviewed the record and determined that the district was implementing curriculum changes within its discretion under Education Law §1709. On that basis, the appeals were dismissed.

B. Appeals of the Moravia Teachers' Association, 36 Ed Dept Rep 413, Decision No. 13,764, 4/29/97

In this appeal, the teachers' association alleged that the district failed to follow its shared decisionmaking plan by usurping the shared decisionmaking team's ability to plan staff development days and adopting a student discipline code. Petitioners sought a determination that these issues were the responsibility of the shared decisionmaking team and requested an outside facilitator to address these disputes. The language of the district's shared decisionmaking plan specifically exempted issues that impacted on health, safety, civil rights or state, local or federal law. On that basis, the Commissioner found that the district was within its discretion to schedule staff development days and enact a student discipline code under Education Law §1709(32) and (2).

XII. STUDENT DISCIPLINE

A. Appeal of E.L., 36 Ed Dept Rep 130, Decision No. 13,679, 9/27/96

Petitioner appealed from the district's refusal to permit her son to participate in his senior trip as a disciplinary measure. As a procedural point, the board of education had adopted a policy encouraging parents who disagree with school administrators' decisions to appeal to the board prior to initiating an appeal to the Commissioner. The Commissioner commended the board for encouraging resolution of disputes at the local level, but acknowledged that, in this instance, Education Law §310 did not require exhaustion prior to appealing to the Commissioner. Consequently, the Commissioner accepted the appeal directly from the superintendent's decision. The appeal was dismissed on the merits.

B. Appeal of a Student with a Disability, 36 Ed Dept Rep 273, Decision No. 13,723, 12/31/96

After an incident with his principal, a student was suspended for five days and scheduled for a superintendent's disciplinary hearing. After the district's §504 committee found no nexus between the student's disability and his misconduct, he was found guilty of threatening a teacher and failing to follow a reasonable directive, and was transferred to an alternative high school. While a suspension with alternative education is allowable as a disciplinary penalty, a transfer is not, and district's must be careful not to use the terms interchangeably. The Commissioner nullified the penalty and ordered its removal from the student's disciplinary record.

C. Appeal of Eddy, 36 Ed Dept Rep 359, Decision No. 13,748, 3/19/97

Petitioner appealed a ten-day out of school suspension imposed on her son, who was found to have possessed a BB/pellet gun in school. The "gun" apparently used a spring mechanism to propel a BB or pellet, not an explosive charge. The "gun" was not claimed to be a "weapon" within the meaning of the Federal Gun Free Schools Act (see 20 USC §8921), and was not a "firearm" as defined by 18 USC §921. There was also no claim that Education Law §3214(3)(d) applied. The Commissioner upheld the student's suspension as a violation of the school district's rules.

XIII. STUDENTS WITH DISABILITIES

A. Appeal of a Student with a Disability, 36 Ed Dept Rep 4, Decision No. 13,634, 7/11/96

The parent of a student with a disability appealed to the Commissioner seeking an order directing the school district to comply with a stipulation entered into in settlement of an impartial hearing addressing the appropriateness of the child's IEP. The hearing officer retained jurisdiction to determine in the first instance, whether the services and IEP in question were appropriate. The Commissioner dismissed the appeal for failure to exhaust administrative remedies, but reminded the district of its obligation to immediately convene or reconvene the hearing upon receipt of the parent's request.

B. Appeal of a Student with a Disability, 36 Ed Dept Rep 152, Decision No. 13,686, 10/7/96

The parent of a student with a disability challenged the attendance of the school district's attorney at a meeting of the committee on special education (CSE) to discuss her son's individualized education program (IEP). The Commissioner dismissed the appeal because attendance by the district's counsel at the meeting for the purpose of advising the CSE on implementation of a recent hearing decision was not an abuse of the board's discretion and petitioner failed to prove the attendance was for another purpose.

C. Appeal of a Student with a Disability, 36 Ed Dept Rep 181, Decision No. 13,694, 10/21/96

The parent of a fifteen-year-old child who missed school due to a chronic health condition complained that the district failed to provide a tutor. The child was found to be disabled by the CSE in March 1996. Because the appeal alleged failure to provide services related to the student's IEP for 1995/96 and 1996/97, the proper avenue of redress was an impartial hearing and the Commissioner dismissed for failure to exhaust administrative remedies.

D. Appeal of a Student with a Disability, 36 Ed Dept Rep 287, Decision No. 13,726, 1/7/97

The Commissioner declined to accept jurisdiction to decide the "stay put" or "pendency" placement for a nine-year-old multiply-disabled child because the parties and subject matter were pending in federal court, which could provide a full evidentiary hearing.

E. Appeal of a Student with a Disability, 36 Ed Dept Rep 322, Decision No. 13,736, 2/21/97

Parents challenged the decision of an impartial hearing officer upholding the recommendations of respondent's §504 committee concerning reasonable accommodations for their son who suffered from asthma. The appeal was dismissed due to lack of jurisdiction. Where a child is identified as a student with a disability pursuant to the IDEA, federal law requires State educational agencies to provide impartial reviews of local decisions. In New York, the Legislature vested the authority to conduct such reviews in a State Review Officer. However, §504 contains no similar requirement nor has the New York State Legislature granted such authority to the Commissioner or State Review Officer. In certain cases, the Commissioner may have an independent basis for addressing petitioners' claims which would also constitute §504 violations. Similarly, cases properly before the State Review Officer may raise §504 issues. However, where a petitioner is solely alleging §504 violations, enforcement is within the jurisdiction of the federal courts, the U.S. Department of Justice and the U.S. Department of Education.

F. Appeal of a Student with a Disability, 36 Ed Dept Rep 436, Decision No. 13,771, 5/30/97

The Commissioner declared the "stay put" or "pendency" placement of a fifteen-year-old emotionally disturbed student to be a special class setting with a student:teacher ratio of 12:1 with a teaching aide. In addition, the Commissioner admonished the district and directed it to cease the practice of requiring parents to obtain psychiatric evaluations of their disabled children at their own expense in violation of the IDEA and Section 504 of the Rehabilitation Act.

G. Appeal of a Student with a Disability, 36 Ed Dept Rep __, Decision No. 13,777, 6/19/97

The Commissioner dismissed as moot the appeal of a parent challenging a hearing officer's refusal to recuse himself in a dispute relating to her learning disabled son's educational program. The decision is significant because it clarifies the method by which school districts are required to select hearing officers. It is the first Commissioner's decision making reference to SED's July, 1996 guidance memorandum identifying all certified hearing officers by county and explaining that the list must include all certified hearing officers available to serve in the district. Because the district in this case amended its list to comply with SED's July, 1996 memo and a new hearing officer was to be appointed from a lawfully constituted list, the case was moot.

XIV. SUPERINTENDENT TERMINATION

A. Appeal of Donlon, 36 Ed Dept Rep 136, Decision No. 13,681, 9/28/96

Petitioner appealed his termination as school superintendent. In 1993, petitioner was involved in the purchase of portable classrooms that were needed due to anticipated classroom space shortages. That purchase was not competitively bid and did not meet State Education Department requirements. Based on these problems, the board of education filed disciplinary charges against petitioner alleging that he was responsible for various illegalities related to the portable classroom project. After a hearing, the board terminated petitioner's employment. Petitioner alleged that he was denied due process in the hearing. The Commissioner found that while others were clearly aware of the portable classroom project, petitioner bore primary responsibility for the problems which arose with the project as chief executive officer of the district. Therefore, the Commissioner dismissed the appeal.

XV. TEACHER CERTIFICATION

A. Appeal of Cracchiolo, 36 Ed Dept Rep 230, Decision No. 13,709, 12/5/96

A tenured teacher with coaching qualifications and experience applied for the position of boys' varsity ice hockey coach. The school board appointed an individual who did not have a valid New York State teaching certificate or temporary coaching license. The Commissioner found that the appointment violated the Education Law and Commissioner's regulations and removed the coach. Certified physical education teachers may coach any sport, and teachers certified in other areas with coaching qualifications and experience may coach provided they complete certain first aid and course requirements. Also, a board of education may employ uncertified persons with coaching qualifications and experience as temporary coaches of interschool sport teams, but only when certified physical education teachers or certified teachers with coaching qualifications and experience are not available. Uncertified persons must first obtain from the Commissioner a temporary coaching license.

B. Appeal of Kimball, 36 Ed Dept Rep ___, Decision No. 13,787, 6/29/97

The father of a girls' varsity basketball team member contended that the school board violated the Education Law and Commissioner's regulations in appointing the team's coach because he was not a certified teacher and did not hold a temporary coaching license. He further argued that the coach was not eligible for a temporary coaching license because a certified teacher with coaching qualifications and experience applied for the position. Someone who is not a certified teacher, could be appointed as a temporary coach only if (i) neither a certified physical education teacher nor a teacher certified in another area but with coaching qualifications and experience were available and (ii) he had a temporary coaching license. In this case, a certified teacher with coaching qualifications and experience appeared to be available. The team's former coach applied for the position, and the board failed to adequately explain why he was not qualified. Furthermore, the individual who was appointed did not have a temporary coaching license. While the board argued that an application for a temporary license had been submitted to the State Education Department, the regulation clearly states that a board may employ an uncertified person as a coach "upon the issuance by the commissioner of a temporary coaching license." This means that the uncertified individual employed by the district may not undertake coaching responsibilities until he/she has actually received a temporary license. Since the team's season was over, the Commissioner found the board in violation of the Education Law and Commissioner's regulations and ordered it to strictly comply with those provisions in the future.

XVI. TEACHER PROBATIONARY APPOINTMENTS

A. Appeal of Szymkowiak, 36 Ed Dept Rep 204, Decision No. 13,702, 11/14/96

Petitioner challenged his termination as a probationary teacher, alleging that such action was in retaliation for various complaints petitioner had made, including petitioner's objections to the manner in which the school district provided instruction in acquired immune deficiency (AIDS) and allegations of district noncompliance with federal smoking restrictions. The Commissioner found that the termination of petitioner's services was not done in retaliation for his complaints and also provided several procedural clarifications. First, the Commissioner held that allegations of violations of federal and state laws relating to smoking on school property were matters or acts "pertaining to the common schools" and, thus, within his jurisdiction under Education Law §310. (The Commissioner found respondent board had corrected areas of noncompliance and those claims, therefore, were moot.) The Commissioner also clarified that the provisions of 8 NYCRR 135.3(c)(2)(i) relating to AIDS instruction do not apply to BOCES. While a board of education may include workshops provided by BOCES through shared services as part of its AIDS instruction, the ultimate responsibility for ensuring compliance with §135.3(c)(2)(i) rests with the component board of education. (Petitioner failed to join the component boards of education and, therefore, that part of his appeal was dismissed.)

XVII. TEACHER PAY

A. Appeal of Carr, 36 Ed Dept Rep 250, Decision No. 13,716, 12/19/97

A tenured teacher in the district appealed the salary deduction imposed upon her return from maternity leave. The teacher returned to work on April 15th, but discovered that the district had deducted ten days' pay for the period April 1 to 12. In this district, school was in recess from April 1 to April 12, and teachers in the district were only required to work twelve days in the month of April. Under Education Law §3101(3), a teacher is entitled to salary for a month in which the teacher has rendered services for all the days in which a teacher was required to work. The record indicated that the teacher had performed services for all the days in which teachers were required to render services in that district. Therefore, the Commissioner ordered the district to pay the teacher $1348.60 representing the underpayment of her salary for the month of April.

XVIII. TEACHER TENURE

A. Appeal of Craft, et al., 36 Ed Dept Rep 314, Decision No. 13,734, 2/19/97

Two members of the board of education abstained from voting on whether to grant tenure to a probationary teacher on the basis of their philosophical objection to the current system for granting tenure, rather than upon their assessment of the merit of the teacher involved. The board nevertheless proceeded by a vote of seven in favor, none opposed and two abstentions, to grant tenure to the teacher. The Commissioner dismissed the appeal of the abstention votes on the ground that the petitioners lacked standing to challenge the two board members' actions. However, the Commissioner observed that the two board members, by abstaining on the tenure vote on the basis of their personal opinions concerning the current tenure system, rather than upon their assessment of the merit of the particular teacher recommended for tenure, could be found to have violated their oath of office and to be in neglect of their duty as members of the board.

XIX. 3020-a

A. Appeal of Board of Education of the Longwood Central School District, 36 Ed Dept Rep 145, Decision No. 13,683, 9/30/97

The board of education appealed the determination of a hearing panel convened pursuant to Education Law §3020-a which found a teacher guilty of conduct unbecoming a teacher, immoral conduct and insubordination and recommended his suspension for six months. The teacher was found guilty of improperly touching and speaking to female students based on a number of incidents. The Commissioner dismissed the appeal as untimely, since the appeal by the board was instituted beyond the 30 day time period set forth in the regulations, and the district did not present any excuse for the delay.

B. Application to reopen the appeal of the Longwood Central School District, 36 Ed Dept Rep 245, Decision No. 13,714, 12/19/97

The Commissioner declined to grant the application to reopen the previous appeal where the board alleged that the Commissioner misapprehended the facts by dismissing the appeal as untimely. The board argued that the Commissioner should have exercised his discretion to reopen the appeal and offered an excuse for the untimely petition in the application to reopen. The decision noted that an appeal instituted to challenge the determination of an Education Law §3020-a hearing panel is considered timely only if it is commenced within 30 days of receipt of the decision sought to be reviewed. Since no basis was demonstrated to reopen the prior decision, the application was denied.

TITLE IX: A ROLLERCOASTER IN DISGUISE

BY

HEATHER D. DIDDEL
WHITEMAN OSTERMAN & HANNA

FOR

CAPITAL AREA SCHOOL DEVELOPMENT ASSOCIATION
TWELFTH ANNUAL SCHOOL LAW CONFERENCE

THURSDAY, JULY 17, 1997

I. Introduction

II. Warm Up Exercise

III. Title IX

IV. OCR Sexual Harassment Guidance

V. Sex Harassment in the Workplace/Classroom/Bus

    A. Quid Pro Quo

    B. Hostile Work Environment

VI. Helpful Hints

    A. Preventive Measures

    B. Handling Sex Harassment Complaints

VII. Questions

FOOD FOR THOUGHT

NOTE: *The answers to the questions below are based on the Sexual Harassment Guidance issued by the Office of Civil Rights on March 13, 1997.*

QUESTION	ANSWER
1. What is Title IX?	Title IX was enacted as a federal education amendment in 1972. It was viewed as a rather limited legal vehicle with which to enforce gender-based protections in federally funded educational institutions. It has evolved into a significant civil rights statute and is used with increasing frequency and success in federal discrimination lawsuits.
2. To what entities does Title IX apply?	To all educational institutions.
3. As a general matter, what kind of legal protection does Title IX provide?	Title IX provides an explicit prohibition against gender-based discrimination in programs and activities receiving federal financial assistance. It specifically provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681. Please note that there are a number of organizations and programs excluded from Title IX's prohibitions. See 20 U.S.C. §1681 (included in today's handout).
4. With regard to sexual harassment, what kind of protection, if any, does Title IX provide for students?	Title IX provides significant protection with regard to peer-to-peer sex harassment and adult to student sex harassment.
5. How long has Title IX been around?	Since 1972.

WP: TABLES\SEX-HAR.TAB

QUESTION		ANSWER
6.	What entity/entities can enforce Title IX?	The Office of Civil Rights (U.S. Department of Education) and the U.S. federal courts.
7.	How long have individuals been able to use Title IX to sue educational institutions?	Since the 1979 U.S. Supreme Court decision in Cannon v. Univ. of Chicago, 99 S.Ct. 1946.
8.	Do male students have Title IX protection?	Yes. Both males and females are entitled to Title IX protection with regard to gender-based discrimination.
9.	Who, if anybody, has responsibility for handling sex discrimination or sexual harassment complaints in your district?	
10.	Do you have a Title IX coordinator?	You should. Title XI requires that districts appoint at least one Title IX coordinator. (It may be advisable to select more than one Title IX coordinator in the event that discrimination allegations are made against a Title IX coordinator.)
11.	If not, why not?	There are no good reasons for having no Title IX coordinator.
12.	If yes, what are his/her/their responsibilities?	The Title IX coordinator is, as the name implies, responsible for overall coordination and oversight of the District's Title IX functions and obligations, including handling Title IX sexual harassment complaints and investigations. The District must notify all students and employees of the Title IX coordinator's name, office address, and telephone number.
13.	Are school districts required by law to have a Title IX coordinator?	Yes.

QUESTION	ANSWER
14. Are school districts required by law to have a policy against sex discrimination?	Yes.
15. Are school districts required by law to adopt and publish grievance procedures to handle complaints of discrimination on the basis of sex?	Yes. It is essential that a District implement and publish grievance procedures for sex discrimination claims. The procedures must provide for prompt and effective resolution of sexual discrimination complaints, including sexual harassment.
16. In a 1993 study, public school students in grades 8-11 were polled with regard to personal experiences of sexual harassment. What percentage would you expect to report that they had been sexually harassed at some point during their school career?	According to "Hostile Hallways," published in 1993 by the American Association of University Women, 81% of the students polled reported personal experiences of sexual harassment at school.
17. Where does sexual harassment in schools occur?	It can occur anywhere in the District.
18. Is the District responsible for sexual harassment of a student by:	
a. A peer?	a. Yes.
b. A teacher?	b. Yes.
c. A teacher's aide?	c. Yes.
d. An administrator?	d. Yes.
e. A principal?	e. Yes.
f. A Superintendent?	f. Yes.
g. "Third-parties"--including special event speakers, visitors, consultants, parents?	g. Yes.

QUESTION	ANSWER
19. How many different kinds of sexual harassment are recognized by the courts and/or enforcement agencies?	Two categories of sexual harassment: 1) Quid pro quo. 2) Hostile environment.
20. What are the distinctions between the different kinds of sex harassment recognized by the courts and enforcement agencies?	1) Quid Pro Quo Harassment Quid pro quo harassment occurs when a "school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Quid pro quo harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm." (Federal Register, Vol. 62, No. 49 at 12038.) Under the OCR guidelines, only unwelcome sexual harassment is legally actionable. If the alleged harassment relates to "consensual sexual relationships between a school's adult employees and its students, OCR applies the following standard for assessment of welcomeness:

QUESTION	ANSWER
20. (Cont'd)	- OCR "will never view sexual conduct between an elementary student and an adult school employee as consensual"; - OCR will apply "a strong presumption that sexual conduct between a secondary student and an adult school employee is not consensual." NOTE: Where older secondary or post-secondary students are involved in an alleged quid pro quo situation, OCR considers a number of factors to determine whether a school employee's sexual advances or other sexual conduct were actually unwelcome. (Fed. Reg., Vol. 62, No. 49 at 12040.)

QUESTION	ANSWER
20. (Cont'd)	2) Hostile Environment Sexual Harassment "Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." (Id.)
21. Who said the following: "First of all, let me say that being sexually harassed since the 5th grade has gone beyond the damage of affecting the way I feel . . . now, I have no pride, no self-confidence, and still no way out of the [misery] I am put through in my school."	Children can be, and often are, deeply affected by sexual harassment. This quotation comes from a young child interviewed in 1993 by members of the Center for Research on Women at Wellesley College in Wellesley, Massachusetts.

QUESTION	ANSWER
22. An 18-year-old, female student at the District has a "really cute math teacher." One day, the math teacher asks the student to a fancy restaurant because, he says, he wants to talk to her about her grade. The teacher repeatedly tells the student how beautiful she is, and over dinner at the fancy restaurant, asks if she would spend the night with him at his home. He tells the student that it would bring up her grade significantly. The student spends the night at the teacher's house and has sexual intercourse with him. The student gets bad grades in math. What, if any problems do you see in this real-life scenario?	This incident could be the basis for quid pro quo allegations. OCR will look into the "welcomeness" issue because of the age of the student. (Regardless of OCR standards, this type of teacher conduct should be the ground for severe discipline, up to and including potential termination.)
23. A female high school student is in desperate need of financial assistance in order to afford college. She speaks periodically with the school's financial aid officer. One day, the student reports to a teacher with whom she is friendly that the financial aid officer made it clear to her that she could get the money she needed if she slept with him. Is there a sexual harassment problem under the Title IX standard?	Yes. See answer to Question No. 22, above. There may also be a hostile environment claim.

QUESTION	ANSWER
24. A female student scored less than anticipated on an examination. Her male teacher placed her over his knee and spanked her. This was done in private and was presumed to be intended as a joke. The teacher later informed the female student that she could retake the examination the next day, but that she should prepare to receive another spanking if she did not receive a certain score. When the student complained to others about the incident, the teacher offered to give her an A if she would speak with him first before complaining of the incident. Is there sexual harassment in these facts and, if so, what kind?	As a general matter, the teacher plainly engaged in inappropriate conduct and should be disciplined. In terms of Title IX, however, it is unclear on these limited facts whether there was a hostile environment. Quid pro quo harassment would most likely be ruled out on these facts. The age of the student would be relevant and could trigger further inquiry into the student's own conduct and the "welcomeness" of the teacher's conduct.

QUESTION		**ANSWER**
25.	What, if any, liability does a district have for sex harassment that occurs on district premises or in district programs?	The District will be liable for quid pro quo even if the District was not on notice that the school employee had a proclivity for engaging, or actually engaged, in quid pro quo sexual harassment. Depending upon the facts, the District will be liable for hostile environment sexual harassment if it failed to take immediate and appropriate steps to remedy known sexual harassment. To limit its liability, the District must meet the Title IX requirement for both a sex discrimination policy and an effective grievance procedure. The District can be held liable under OCR guidelines for sexual harassment of students by other students and third parties, as well as school employees.
26.	What, if any, liability do school districts have for quid pro quo harassment?	See answer to Question No. 25.
27.	What, if any, liability do school districts have for teacher-student harassment and peer-to-peer harassment?	See answer to Question No. 25.
28.	What kind of conduct constitutes hostile environment under Title IX?	See answer to Question No. 20.

QUESTION	ANSWER
29. Which of the following constitute examples of sexual conduct:	
a. Sexual advances;	a. Yes.
b. Graffiti of a sexual nature;	b. Yes.
c. Tying shoe laces with cartoon images of buxom naked ladies on the laces;	c. Possibly.
d. Displaying or distributing sexually explicit drawings, pictures or written material;	d. Yes.
e. "Dirty" jokes;	e. Yes.
f. Pressure for sexual favors;	f. Yes.
g. Asking a classmate of the opposite sex to join you for an ice cream soda;	g. No.
h. Spreading rumors about or rating other students with regard to sexual prowess or activity;	h. Yes.
i. Touching oneself sexually or talking about one's sexuality in front of another.	i. Yes.
30. Does all sexual conduct create a sexually hostile environment?	No.
31. Is all physical conduct considered by the courts and enforcement agencies to constitute sexual conduct?	No.

WP: TABLES\SEX-HAR.TAB

QUESTION	ANSWER
32. Do any or all of the following examples of conduct constitute sexual conduct:	
a. An athletic coach hugs a student who just scored a goal?	a. On these facts alone, no.
b. A kindergarten teacher gave a consoling hug to a child in her class who had just scraped his knee?	b. No.
c. At the direction of the wrestling coach, a male high school student demonstrated a wrestling maneuver requiring close physical contact with another male student?	c. No.
d. A teacher repeatedly hugs or puts his arms around students?	d. Maybe.
33. Can sexually explicit graffiti directed by a group of girls against one other girl constitute sex harassment?	Yes.
34. Does a single sexual joke, offensive to certain students, create a sexually hostile environment?	No.

QUESTION	ANSWER
35. Is "a kiss just a kiss?"	A kiss (with no other sexual conduct, etc.) can be just a kiss--in other words, it would not be deemed sexual harassment by OCR, particularly if it occurs between first graders. OCR stresses District use of common sense in assessing whether Title IX sexual harassment has occurred.
36. Can a hostile environment be created for Student A where:	
a. He witnesses a gang of older students directing crude, sexual comments toward his classmate, Student B?	a. Yes.
b. She witnesses her middle school teacher Mr. X making sexual comments and gestures directed at her female classmate and close friend?	b. Yes.
c. She overhears a male student tell her best female friend that she has a good figure?	c. No.
37. In a hostile work environment lawsuit, what, if any, significance do the courts ascribe to the existence of a sexual harassment policy and procedure for handling complaints?	Great significance. The District's liability can hinge on these issues.

QUESTION		ANSWER
38.	A female student (1) rebuffs her male math teacher's repeated attempts to kiss her, and (2) tells him that his sexual comments, jokes and "friendly hands" make her feel uncomfortable. The student reports her teacher's conduct to the Title IX Coordinator. One month later, the student receives a poor grade from her math teacher. Does the District have any legal problems in this situation?	Possibly. The reason is that the poor grade may appear to be retaliatory. It may, in fact, not be retaliatory; the student may have received chronic low grades in math. The District should, however, investigate to determine whether the teacher's grade was retaliatory. Retaliation is illegal. Thus, if the District finds the teacher acted in a retaliatory manner, it must rectify matters.
39.	In a school setting, can a single incident of sexual assault (rape) create a hostile work environment? If so, can that conduct be imputed to the District under Title IX? (Translation: Is the District liable for such conduct?)	Yes. It can also be hostile environment, depending on the facts. The District can be held liable.

QUESTION		ANSWER
40.	Does a school district have liability under Title VII for a teacher's sexual harassment of a student under the following facts? Jane Doe was an eighth grade honor student for the 1990-91 school year. Because the teacher perceived that Doe needed a more challenging academic program, she referred the student to her husband Joe who led a high school discussion group. Doe participated in this group for several weeks and when she became a ninth grader in 1991-92, she was assigned to Joe's class in advanced social studies. The teacher-student relationship blossomed during the academic year, fertilized (in part) by the teacher's efforts to go out of his way to flatter Doe and to spend time alone with her. The teacher initiated sexual contact with Doe during the spring of her tenth grade year (1991-92). Under the pretext of returning a book, the teacher visited Doe at home (where he knew she would be alone) and fondled her breasts and unzipped her pants. During the summer of 1992, the teacher had sex on a regular basis with Doe (who had by then attained the ripe age of 15). None of the encounters took place on school property.	Certain federal courts (such as the Fifth Circuit Court of Appeals) would find no liability. In the Second Circuit (which is our Court of Appeals), and under OCR guidelines, the student may be able to prevail on a hostile environment claim and/or a quid pro quo claim--depending on which additional facts are adduced.

QUESTION	ANSWER
40. (Cont'd) The relationship was terminated in January 1993 when a local police officer discovered the teacher and Joe having sex. There is no direct evidence that any school official was aware of the teacher's exploitation of the student until January 1993.	
41. A teacher molests a second grade student during movies shown on school premises; another teacher has notice of the abusive conduct. The student and her mother reported the abuse to a teacher.	Under Title IX/OCR guidelines, the District has significant potential exposure for a hostile environment claim. To diminish potential liability, the District should (1) have a sex discrimination policy, (2) have an effective grievance procedure, (3) conduct an immediate and effective investigation, and (4) promptly and effectively resolve the sexual harassment complaint.

QUESTION	ANSWER
42. Should the school district be found liable under the following facts: An 11-year-old, female sixth-grader was repeatedly tormented by a male classmate who called her names, made obscene gestures and violent threats to her. He called her a "bitch" and a "whore" and told her to "watch her back." The girl was terrorized every day by the boy's conduct. The girl's parents contacted the boy's family, the teacher, the principal and the superintendent. Her parents gave the Superintendent a letter from the parents of another girl who had been harassed by the same boy. They also tried to bring the matter before the school board. The superintendent advised the parents that little girls are sometimes "just too sensitive." In addition, the superintendent told the parents that school officials were unable to "verify the evidence" and were worried that removing the boy from the class and putting him into counseling would violate the boy's rights. The District took no action. Any Title IX exposure?	This case is a model for what districts should never do with student sexual harassment claims. Under Title IX, the student in this scenario has a compelling peer-to-peer hostile environment claim.

QUESTION	ANSWER
43. Are there grounds under Title IX to hold a district liable for violation of its Title IX obligations under the following facts: A 12-year-old, sixth-grade girl ("Doe") and her friends were verbally and physically harassed by boys in their class. They were called "dog-faced bitch," "retard," "lesbian bitches," "dogs," "scum," "prostitute," and "luz-bos." Doe claimed that on numerous occasions boys physically touched her and some of the other girls, snapping their bras, grabbing a girl's breasts, shoving paper down their blouses, pushing, shoving, smacking, spitting, kicking, pulling hair and cutting hair. In addition, the student and her family perceived that she was not receiving an adequate level of instruction.	It depends. Questions to ask include: 1. Can the student prove her claims? 2. Was the District on notice? 3. Did the District have a sex discrimination policy and effective grievance procedure? 4. Did the District respond swiftly and effectively to resolve the problem as soon as it had, or reasonably should have had, notice?

	QUESTION	ANSWER
44.	What, if any, liability does the District have under Title IX for the following conduct: A seven-year-old female student ("Doe") repeatedly told her mother about "naughty" language he heard on the school bus, about how the boys on the bus made lewd comments about her sexual organs (including, but not limited to, her having a "stinking vagina") and told her to perform a sexual act on her father. The boys apparently threatened her and some of her friends with rubber knives. Not surprisingly, Doe did not want to get on the bus and often came off the bus crying. The bus driver appeared to respond to the boys' conduct by laughing along or shrugging it off because "boys will be boys." When Doe talked to her mother about specific incidents one day, she told her that she guessed it was just the way boys are supposed to treat girls.	This scenario is based on an actual case in Eden Prairie, Minnesota. This child's claims under Title IX were sustained. Translate: The District under OCR guidelines will have serious potential liability.

federal register

Thursday
March 13, 1997

Part VII

Department of Education

Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice

DEPARTMENT OF EDUCATION

Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

ACTION: Final policy guidance.

SUMMARY: The Assistant Secretary for Civil Rights issues a final document entitled "Sexual Harassment Guidance" (Guidance). Sexual harassment of students is prohibited by Title IX of the Education Amendments of 1972 under the circumstances described in the Guidance. The Guidance provides educational institutions with information regarding the standards that are used by the Office for Civil Rights (OCR), and that institutions should use, to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students (peers), or third parties.

FOR FURTHER INFORMATION CONTACT: Howard I. Kallem, U.S. Department of Education, 600 Independence Avenue, S.W., Room 5412 Switzer Building, Washington, D.C. 20202–1174. Telephone (202) 205–9641. Internet address: Howard_Kallem@ed.gov For additional copies of this Guidance, individuals may call OCR's Customer Service Team at (202) 205–5413 or toll-free at 1–800–421–3481. Individuals who use a telecommunications device for the deaf (TDD) may call the Department's toll-free number, 1–800–421–3481, in conjunction with the phone company's TDD relay capabilities. This Guidance will also be available at OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

SUPPLEMENTARY INFORMATION:

Purpose of the Guidance

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. Sexual harassment of students can be a form of discrimination prohibited by Title IX. The Office for Civil Rights has long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX. OCR's policy and practice is consistent with the Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs. It is also consistent with United States Supreme Court precedent and well-established legal principles that have developed under Title IX, as well as under the related anti-discrimination provisions of Title VI and Title VII of the Civil Rights Act of 1964.

The elimination of sexual harassment of students in federally assisted educational programs is a high priority for OCR. Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

The Guidance applies to students at every level of education. It provides information intended to enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence. In addition, the Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students. The Guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs. The Guidance discusses factors to be considered in applying the standards and examples that are designed to illustrate how the standards may apply to particular situations. Overall, the Guidance illustrates that in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

In addition, it is clear from the Guidance that not all behavior with sexual connotations constitutes sexual harassment under Federal law. In order to give rise to a complaint under Title IX, sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment. For a one-time incident to rise to the level of harassment, it must be severe.

As illustrated in the Guidance, school personnel should consider the age and maturity of students when responding to allegations of sexual harassment. The Guidance explains that age is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the appropriate response by the school. For example, age is relevant in determining whether a student welcomed the conduct and in determining whether the conduct was severe, persistent, or pervasive. Age is a factor to be considered by school personnel when determining what type of education or training to provide to students in order to prevent sexual harassment from occurring.

Notably, during the time that the Guidance was available for public comment, several incidents involving young students occurred in public schools and were widely reported in the press. In one incident a school reportedly punished a six-year-old boy, under its sexual harassment policy, for kissing a female classmate on the cheek. These incidents provide a good example of how the Guidance can assist schools in formulating appropriate responses to conduct of this type. The factors in the Guidance confirm that a kiss on the cheek by a first grader does not constitute sexual harassment.

Consistent with the Guidance's reliance on school employees and officials to use their judgment and common sense, the Guidance offers school personnel flexibility in how to respond to sexual harassment. Commenters who read the Guidance as always requiring schools to punish alleged harassment under an explicit sexual harassment policy rather than by use of a general disciplinary or behavior code, even if the latter may provide more age-appropriate ways to handle those incidents, are incorrect. First, if inappropriate conduct does not rise to the level of harassment prohibited by Title IX, school employees or officials may rely entirely on their own judgment regarding how best to handle the situation.

Even if a school determines that a student's conduct is sexual harassment, the Guidance explicitly states that Title IX permits the use of a general student disciplinary procedure. The critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence. If treating sexual harassment merely as inappropriate behavior is not effective in ending the harassment or in preventing it from escalating, schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination.

Process in Developing the Guidance

Because of the importance of eliminating sexual harassment in schools, and based on the requests of schools, teachers, parents, and other interested parties, OCR determined that it should provide to schools a

BEST COPY AVAILABLE

comprehensive discussion of the legal standards and related issues involved in resolving sexual harassment incidents. While this document reflects longstanding OCR policy and practice in this area, it also reflects extensive consultation with interested parties. Even before making documents available for formal comment, OCR held a series of meetings with groups representing students, teachers, school administrators, and researchers. In these discussions, OCR gained valuable information regarding the realities of sexual harassment in schools, as well as information regarding promising practices for identifying and preventing harassment. These insights and learning are reflected in the Guidance.

Issuance of the Guidance for Comment and the Format of the Final Guidance

On August 16, 1996, the Assistant Secretary for Civil Rights published a notice in the **Federal Register** (61 FR 42728) regarding the availability of a document entitled: "Sexual Harassment Guidance: Peer Sexual Harassment" (Peer Guidance) and inviting comments on the document. Subsequently, on October 4, 1996, the Assistant Secretary published in the **Federal Register** (61 FR 52172) a request for comments on a document entitled: "Sexual Harassment Guidance: Harassment of Students by School Employees" (Employee Guidance). Both notices stated that the guidance documents reflected longstanding OCR policy and practice and invited comments and recommendations regarding their clarity and completeness.

The most significant change in the format of the final document is that it combines the two separate guidance documents into one document that addresses sexual harassment of students by peers, school employees, or third parties. Commenters frequently stated that a combined document would be clearer and easier to use. OCR agrees. Thus, the term "Guidance" when used in this preamble refers to the combined document that incorporates both the Peer Guidance and the Employee Guidance.

Analysis of Comments and Changes

In response to the Assistant Secretary's invitations to comment, OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance. Many commenters stated that the guidance documents provided comprehensive, clear, and useful information to schools. For instance, one commenter stated that the Peer Guidance was "a godsend * * * in one convenient place [it provides] the clear implications of the statutes, regulations, and case law." Another commenter stated that the Guidance "will assist universities * * * in maintaining a harassment-free educational environment."

Commenters also provided many specific suggestions and examples regarding how the final Guidance could be more complete and clearer. Many of these suggested changes have been incorporated into the Guidance.

The preamble discusses recurring and significant recommendations regarding the clarity and completeness of the document. While the invitations to comment on the Peer Guidance and Employee Guidance did not request substantive comments regarding OCR's longstanding policy and practice in the area of sexual harassment, some commenters did provide these comments. In instances in which OCR could provide additional useful information to readers related to these comments, it has done so in the preamble. Comments are grouped by subject and are discussed in the following sections.

The Need for Additional Guidance

Comments: Many commenters agreed that a document combining the Peer Guidance and the Employee Guidance would provide more clarity to schools. Commentors disagreed, however, regarding whether, and what type of, additional information is needed to enhance schools' understanding of their legal obligations under Title IX. Some commenters asked for more detailed analysis regarding the applicable legal standards, including hard and fast rules for determining what is harassment and how a school should respond. Other commenters, by contrast, found OCR's guidance documents, including the extensive legal citations, to be too detailed and "legalistic." They expressed a need for a document that is simpler and more accessible to teachers, parents, school administrators, and others who need to know how to recognize, report, or respond to sexual harassment.

Discussion: As the Guidance makes clear, it is impossible to provide hard and fast rules applicable to all instances of sexual harassment. Instead, the Guidance provides factors to help schools make appropriate judgments.

In response to concerns for more analysis of the legal standards, OCR has provided additional examples in the Guidance to illustrate how the Title IX legal standards may apply in particular cases. It is important to remember that examples are just that: they do not cover all the types of situations that may arise. Moreover, they may not illustrate the only way to respond to sexual harassment of students because there is often no one right way to respond.

OCR also believes that there is a legitimate concern that school administrators, teachers, students, and parents need an accessible document to assist them in recognizing and appropriately responding to sexual harassment. Accordingly, OCR has developed, in addition to the final Guidance, a pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. The pamphlet includes information from the Guidance that would be most useful to these groups as they confront issues of sexual harassment. Concurrent with the issuance of this Guidance, the pamphlet will be issued with copies available from all OCR offices and an electronic posting on OCR's web site. For a copy of the pamphlet, individuals may call OCR's Customer Service Team at (202) 205–5413 or toll-free 1–800–421–3481. Copies will also be available from all OCR enforcement offices, and the pamphlet will be posted on OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

Additional Guidance on the First Amendment

Comments: Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX's prohibition of sexual harassment. Several of these commenters wanted OCR to announce hard and fast rules in this area, although commenters disagreed on what those rules should be. For instance, one commenter requested that OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other commenters requested that OCR include specific examples regarding the application of free speech rights.

Discussion: As the documents published for comment indicated, the resolution of cases involving potential First Amendment issues is highly fact- and context-dependent. Thus, hard and fast rules are not appropriate.

However, in order to respond to concerns that schools need assistance in making these determinations, OCR has provided additional examples in the Guidance regarding the application of

BEST COPY AVAILABLE

the First Amendment principles discussed there.

Application of Guidance to Harassment by Third Parties

Comments: Several commenters stated that it was unclear whether the Guidance applies if a student alleges harassment by a third party, i.e., by someone who is not an employee or student at the school.

Discussion: The Guidance clarifies that the principles in the Guidance apply to situations in which, for example, a student alleges that harassment by a visiting professional speaker or members of a visiting athletic team created a sexually hostile environment. The Peer Guidance did, in fact, discuss the standards applicable to the latter situation in which students from another school harassed the school's students.

The applicable standards have not changed, but the final Guidance clarifies that the same standards also apply if adults who are not employees or agents of the school engage in harassment of students.

Application of Guidance to Harassment Based on Sexual Orientation

Comments: Several commenters indicated that, in light of OCR's stated policy that Title IX's prohibition against sexual harassment applies regardless of the sex of the harassed student or of the sex of the alleged harasser, the Guidance was confusing regarding the statement that Title IX does not apply to discrimination on the basis of sexual orientation.

Discussion: The Guidance has been clarified to indicate that if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian. If, for example, harassing conduct of a sexual nature is directed at gay or lesbian students, it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students. The Guidance provides examples to illustrate the difference between this type of conduct, which may be prohibited by Title IX, and conduct constituting discrimination on the basis of sexual orientation, which is not prohibited by Title IX. The Guidance also indicates that some State or local laws or other Federal authority may prohibit discrimination on the basis of sexual orientation.

The Effect on the Guidance of Conflicting Federal Court Decisions

Comments: Several commenters requested clarification of the standards to be applied to sexual harassment cases in States subject to the jurisdiction of the United States Court of Appeals for the Fifth Circuit, specifically in light of the Fifth Circuit's decision in *Rowinsky* v. *Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

Discussion: One beneficial result of the Guidance will be to provide courts with ready access to the standards used by the agency that has been given the authority by law to interpret and enforce Title IX. Courts generally benefit from and defer to the expertise of an agency with that authority.

Nevertheless, OCR recognizes that recent Fifth Circuit decisions add to schools' confusion regarding Title IX legal standards. In *Rowinsky*, the Fifth Circuit held that a school is not liable under Title IX even if it is on notice of peer sexual harassment and it ignores or fails to remedy it, unless it responds differently based on the sex of the alleged victim. Consistent with the vigorous dissent in *Rowinsky*, as well as with other Federal decisions contrary to the *Rowinsky* holding, OCR continues to believe that the *Rowinsky* decision was wrongly decided. In OCR's view, the holding in *Rowinsky* was based on a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school's own discrimination in failing to respond once it knows that the harassment is happening.

In two very recent decisions involving sexual harassment of students by school employees, the Fifth Circuit again applied Title IX law in a manner inconsistent with OCR's longstanding policy and practice. First, in *Canutillo Indep. School Dist.* v. *Leija*, 101 F.3d 393, 398–400 (5th Cir. 1996), the court held, again over a strong dissent and contrary to OCR policy, that a school district was not liable for the sexual molestation of a second grade student by one of her teachers because the student and her mother only reported the harassment to her homeroom teacher. The court determined that notice to the teacher was not notice to the school—notwithstanding that a school handbook instructed students and parents to report complaints to the child's primary or homeroom teacher.

Finally, in *Rosa H.* v. *San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (Feb. 17, 1997), the Fifth Circuit reversed a jury finding that a school district was liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student, often during the school day. The court held that, while "there was no question that the student was subject to discrimination based on sex," a school is liable only in situations in which an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Several of the decisions discuss according "appreciable deference" to OCR's interpretation of Title IX in appropriate circumstances and contain other indications that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law, even if it is inconsistent with OCR policy. OCR will also participate where appropriate, and in conjunction with the Department of Justice, to shape the evolution of Title IX law in a manner consistent with the Guidance.

Inconsistent decisions do not prohibit schools in States in the Fifth Circuit from following the Guidance. Since the Guidance assists school in ensuring that students can learn in a safe and nondiscriminatory educational environment, it is the better practice for these schools to follow the Guidance. Indeed, in light of the evolving case law in the Fifth Circuit, following the Guidance may also be the safest way to ensure compliance with the requirements of Title IX. School personnel in States in the Fifth Circuit should also consider whether State, local, or other Federal authority affects their obligations in these areas.

Notice

Comments: Several commenters recommended that additional guidance be provided regarding the types of employees through which a school can receive notice of sexual harassment. Commenters disagreed, however, on who should be able to receive notice. For instance, some commenters stated that OCR should find that a school has received notice only if "managerial" employees, "designated" employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.

Discussion: The Guidance states that a school has actual notice of sexual harassment if an agent or responsible employee of the school receives notice. An exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student. Thus, the Guidance gives examples of the types of employees that can receive notice of harassment. In this regard, it is important for schools to recognize that the Guidance does not necessarily require that any employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence. An employee may be required only to report the harassment to other school officials who have the responsibility to take appropriate action.

OCR does not agree with those commenters who recommend that a school can receive notice only through managerial or designated employees. For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration.

Comments: Several commenters stated that constructive notice, or the "should have known" standard, puts schools in the untenable position of constantly monitoring students and employees to seek out potential harassers.

Discussion: Constructive notice is relevant only if a school's liability depends on notice and conduct has occurred that is sufficient to trigger the school's obligation to respond. As the examples in the Guidance indicate, constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.

Remedying the Effects of Harassment on Students

Comments: Several commenters expressed concern regarding the Guidance's statement that schools may be required to pay for professional counseling and other services necessary to remedy the effects of harassment on students. Some comments indicated confusion over the circumstances under which the responsibility for those costs would exist and concern over the financial responsibility that would be created. Others stated that schools should not be liable for these costs if they have taken appropriate responsive action to eliminate the harassing environment, or if the harassers are non-employees.

Discussion: The final Guidance provides additional clarification regarding when a school may be required to remedy the effects on those who have been subject to harassment. For instance, if a teacher engages in *quid pro quo* harassment against a student, a school is liable under Title IX for the conduct and its effects. Thus, appropriate corrective action could include providing counseling services to the harassed student or paying other costs necessary to remedy the effects of the teacher's harassment. On the other hand, if a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, e.g., in cases of peer harassment, the extent of a school's liability for remedying the effects of harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services.

Confidentiality

Comments: Many commenters recommended additional clarification regarding how schools should respond if a harassed student requests that his or her name not be disclosed. Some commenters believe that, particularly in the elementary and secondary school arena, remedying harassment must be the school's first priority, even if that action results in a breach of a request for confidentiality. These commenters were concerned that, by honoring requests for confidentiality, schools would not be able to take effective action to remedy harassment. Other commenters believe that if requests for confidentiality are not honored, students may be discouraged from reporting harassment. These commenters, therefore, argue that declining to honor these requests would be less effective in preventing harassment than taking whatever steps are possible to remedy harassment, while maintaining a victim's confidentiality. Finally, some commenters were concerned that withholding the name of the victim of harassment would interfere with the due process rights of the accused.

Discussion: The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment. (The Guidance also notes that schools should consider whether the Family Educational Rights and Privacy Act (FERPA) would prohibit a school from disclosing information from a student's education record without the consent of the student alleging harassment.) In addition, OCR has provided clarification by describing factors schools should consider in making these determinations. These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved. These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.

The Guidance also has been clarified to acknowledge that, because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser. The Guidance informs schools that, in all cases, they should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out a thorough investigation.

FERPA

Comments: Several commenters stated that the Department should change its position that FERPA could prevent a school from informing a complainant of the sanction or discipline imposed on a student found guilty of harassment. Some commenters

BEST COPY AVAILABLE

rgued that information regarding the utcome of a sexual harassment omplaint is not an education record overed by FERPA. Other commenters rgued alternatively that any formation regarding the outcome of e proceedings is "related to" the omplainant and, therefore, the nformation can be disclosed to him or r consistent with FERPA. In addition, ome commenters asked for clarification at FERPA does not limit the due rocess rights of a teacher who is ccused of harassment to be informed of e name of the student who has alleged rassment.

Discussion: As these comments dicate, the interplay of FERPA and tle IX raises complex and difficult sues. Regarding requests for rification on the interplay of FERPA d the rights of an accused employee, e Guidance clarifies that the partment does not interpret FERPA to erride any federally protected due rocess rights of a school employee ccused of harassment.

Regarding whether FERPA prohibits e disclosure of any disciplinary action ken against a student found guilty of rassment, it is the Department's rrent position that FERPA prohibits a hool from releasing information to a mplainant if that information is ntained in the other student's ucation record unless— (1) the formation directly relates to the mplainant (for example, an order quiring the student harasser not to ve contact with the complainant); or) the harassment involves a crime of olence or a sex offense in a stsecondary institution. However, in ht of the comments received on this sue, the Department has determined at its position regarding the plication of FERPA to records and formation related to sexual rassment needs further consideration. cordingly, the section on "Notice of tcome and FERPA" has been moved from the Guidance. Additional idance on FERPA will be thcoming.

es Title IX Require Schools to Have Sexual Harassment Policy

Comments: Several commenters quested additional clarity regarding ether Title IX requires schools to ve a policy explicitly prohibiting xual harassment or to have grievance ocedures specifically intended to ndle sexual harassment complaints, both.

Discussion: Title IX requires a cipient of Federal funds to notify dents and parents of elementary and condary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints. Sexual harassment can be a form of sexual discrimination. The Guidance clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does not have to have a policy and procedure specifically addressing sexual harassment, as long as its non-discrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. OCR has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.

Dated: March 10, 1997.

Norma V. Cantú,

Assistant Secretary for Civil Rights.

Sexual Harassment Guidance: Harassment of Students[1] by School Employees, Other Students, or Third Parties

Summary of Contents

Introduction
Applicability of Title IX
Liability of a School for Sexual Harassment
Welcomeness
Severe, Persistent, or Pervasive
Notice
Recipient's Response
Prompt and Equitable Grievance Procedures
First Amendment

Introduction

Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual may be discriminated against on the basis of sex in any education program or activity receiving Federal financial assistance.[2] Sexual harassment of students is a form of prohibited sex discrimination[3] under the circumstances described in the Guidance. The following types of conduct constitute sexual harassment:

Quid Pro Quo Harassment

A school employee[4] explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.[5] *Quid pro quo* harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

Hostile Environment Sexual Harassment

Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature)[6] by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[7]

Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.[8] As outlined in this guidance, grievance procedures also provide schools with an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs.

Finally, if the alleged harassment involves issues of speech or expression, a school's obligations may be affected by the application of First Amendment principles.

These and other issues are discussed in more detail in the following paragraphs.

Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, including elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The Guidance uses the term "schools" to refer to all those institutions. The "education program or activity" of a school includes all of the school's operations.[9] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

It is important to recognize that Title IX's prohibition of sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[10] Similarly, one student's demonstration of a sports maneuver or

BEST COPY AVAILABLE

technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

Title IX protects any "person" from sex discrimination; accordingly both male and female students are protected from sexual harassment engaged in by a school's employees, other students, or third parties.[11] Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.[12] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[13]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[14] sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX. It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority.[15]

It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed at individuals because of their sex.[16] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. Although a comprehensive discussion of gender-based harassment is beyond the scope of this Guidance, in assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.[17]

Liability of a School for Sexual Harassment

Liability of a School for Sexual Harassment by its Employees

A school's liability for sexual harassment by its employees is determined by application of agency principles,[18] i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf.

Accordingly, a school will always be liable for even one instance of *quid pro quo* harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue.[19] Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.[20]

A school will also be liable for hostile environment sexual harassment by its employees,[21] i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment if the employee— (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); [22] or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.[23] For example, a school will be liable if a teacher abuses his or her delegated authority over a student to create a hostile environment, such as if the teacher implicitly threatens to fail a student unless the student responds to his or her sexual advances, even though the teacher fails to carry out the threat.[24]

As this example illustrates, in many cases the line between *quid pro quo* and hostile environment discrimination will be blurred, and the employee's conduct may constitute both types of harassment. However, what is important is that the school is liable for that conduct under application of agency principles, regardless of whether it is labeled as *quid pro quo* or hostile environment harassment.

Whether other employees, such as a janitor or cafeteria worker, are in positions of authority in relation to students—or whether it would be reasonable for the student to believe the employees are, even if the employees are not (i.e., apparent authority)—will depend on factors such as the authority actually given to the employee [25] (e.g., in some elementary schools, a cafeteria worker may have authority to impose discipline) and the age of the student. For example, in some cases the younger a student is, the more likely it is that he or she will consider any adult employee to be in a position of authority.

Even in situations not involving (i) *quid pro quo* harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees under the same standards applicable to peer and third party hostile environment sexual harassment, as discussed in the next section. That is, if the school fails to take immediate and appropriate steps to remedy known harassment, then the school will be liable under Title IX.[26] It is important to emphasize that under this standard of liability the school can avoid violating Title IX if it takes immediate and appropriate action upon notice of the harassment.

Liability of a School for Peer or Third Party Harassment [27]

In contrast to the variety of situations in which a school may be liable for sexual harassment by its employees, a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[28] (Each of these factors is discussed in detail in subsequent sections of the Guidance.) Under these circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Sexually harassing conduct of third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic club) can also cause a sexually hostile environment in school programs or activities. For the same reason that a school will be liable under Title IX for a hostile environment caused by its students, a school will be liable if third parties sexually harass its students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[29] However, the type of appropriate steps the school should take will differ depending on the level of control the school has over the third party harasser.[30] This issue is discussed in "Recipient's Response."

Effect of Grievance Procedures on Liability

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[31] (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by Title IX. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Accordingly, in the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.[32] This is because, without a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied. Moreover, under the agency principles previously discussed, a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.[33]

OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether—(1) the school has a policy prohibiting sex discrimination under Title IX and effective Title IX grievance procedures;[34] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and appropriate corrective action responsive to *quid pro quo* or hostile environment harassment. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.") If the school has taken each of these steps, OCR will consider the case against the school resolved and take no further action other than monitoring compliance with any agreement between the school and OCR. This is true in cases in which the school was in violation of Title IX, as well as those in which there has been no violation of Title IX.[35]

Welcomeness

In order to be actionable as harassment, sexual conduct must be unwelcome. Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive."[36] Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.[37] For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of sexually demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it.[38] Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.[39]

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher's sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged "consensual" sexual relationships between a school's adult employees and its students. If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption,[40] OCR will consider a number of factors in determining whether a school employee's sexual advances or other sexual conduct could be considered welcome.[41] In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations.[42] The factors include:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question. For

example, a student's age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student's ability to do so.

If there is a dispute about whether harassment occurred or whether it was welcome—in a case in which it is appropriate to consider whether the conduct could be welcome—determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

Severe, Persistent, or Pervasive

Hostile environment sexual harassment of a student or students by other students, employees, or third parties is created if conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment. Thus, conduct that is sufficiently severe, but not persistent or pervasive, can result in hostile environment sexual harassment.

In deciding whether conduct is sufficiently severe, persistent, or pervasive, the conduct should be considered from both a subjective [43] and objective [44] perspective. In making this determination, all relevant circumstances should be considered [45]:

- *The degree to which the conduct affected one or more students' education.* For a hostile environment to exist, the conduct must have limited the ability of a student to participate in or benefit from his or her education or altered the conditions of the student's educational environment.[46]
  - Many hostile environment cases involve tangible or obvious injuries.[47] For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior.[48] A student may also suffer physical injuries and mental or emotional distress.[49]
  - However, a hostile environment may exist even if there is no tangible injury to the student.[50] For example, a student may have been able to keep up his or her grades and continue to attend school even though it was more difficult for him or her to do so because of the harassing behavior.[51] A student may be able to remain on a sports team, despite feeling humiliated or angered by harassment that creates a hostile environment.[52] Harassing conduct in these examples alters the student's educational environment on the basis of sex.
  - A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant.[53] For example, if a student or group of students regularly directs sexual comments toward a particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct. Similarly, if a middle school teacher directs sexual comments toward a particular student, a hostile environment may be created for the targeted student and for the students who witness the conduct.
- *The type, frequency, and duration of the conduct.* In most cases, a hostile environment will exist if there is a pattern or practice of harassment or if the harassment is sustained and nontrivial.[54] For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student's breasts, genital area, or buttocks, it need not be as persistent or pervasive in order to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.[55] On the other hand, conduct that is not severe, persistent, or pervasive will not create a hostile environment; e.g., a comment by one student to another student that she has a nice figure. Indeed, depending on the circumstances, this may not even be conduct of a sexual nature.[56] Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment. However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person may request dates in an intimidating or threatening manner.
- *The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.* A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of and relationship between the alleged harasser and the subject or subjects of the harassment. For example, due to the power that a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.[57]
- *The number of individuals involved.* Sexual harassment may be committed by an individual or a group.

In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group. Similarly, while harassment can be directed toward an individual or a group,[58] the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be "safety in numbers." For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

- *The age and sex of the alleged harasser and the subject or subjects of the harassment.* For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.[59]
- *The size of the school, location of the incidents, and context in which they occurred.* Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for the students to avoid their harassers.[60] Harassing conduct in a personal or secluded area such as a dormitory room or residence hall can also have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.
- *Other incidents at the school.* A series of instances at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient.[61]
- *Incidents of gender-based, but non-sexual, harassment.* Acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently severe, persistent, or pervasive to create a sexually hostile environment.[62]

Notice

A school will be in violation of Title IX if the school "has notice" of a sexually hostile environment and fails to take immediate and appropriate corrective action.[63] A school has notice if it actually "knew, or in the exercise of reasonable care, should have known" about the harassment.[64] In addition, as long as an agent or responsible employee of the school received notice,[65] the school has notice.

A school can receive notice in many different ways. A student may have filed a grievance or complained to a teacher about fellow students sexually harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the school may have witnessed the harassment. The school may receive notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have received notice from flyers about the incident or incidents posted around the school.[66]

Constructive notice exists if the school "should have" known about the harassment—if the school would have found out about the harassment through a "reasonably diligent inquiry."[67] For example, if a school knows of some incidents of harassment, there may be situations in which it will be charged with notice of others—if the known incidents should have triggered an investigation that would have led to a discovery of the additional incidents. In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision).[68]

In addition, if a school otherwise has actual or constructive notice of a hostile environment and fails to take immediate and appropriate corrective action, a school has violated Title IX even if the student fails to use the school's existing grievance procedures.

Recipient's Response

Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.[69] As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

Response to Student or Parent Reports of Harassment; Response to Direct Observation by a Responsible Employee or Agent of Harassment

If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee or agent has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student),[70] explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible school employee or agent), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of the Guidance.)

BEST COPY AVAILABLE

It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to immediately place the students in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation.[71] Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.[72] A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.[73] In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by changing housing arrangements[74] or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate[75].

Steps also should be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student.[76] For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, this constitutes *quid pro quo* harassment for which the school is liable under Title IX regardless of whether it knew of the harassment. Thus, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and appropriately.

Finally, a school should take steps to prevent any further harassment[77] and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against a person who filed a complaint on behalf of a student, or against those who provided information as witnesses.[78] At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.[79]

Requests by the Harassed Student for Confidentiality

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that the request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students. Thus, for example, a reasonable response would not require disciplinary action against an alleged harasser if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information.

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.[80]

Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment. There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the

BEST COPY AVAILABLE

complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible—including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX—the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

Response to Other Types of Notice

The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee or agent directly observes sexual harassment of a student. If a school learns of harassment through other means, for example if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include the source and nature of the information; the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment; and whether those individuals want to pursue the matter. If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.

For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If, on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school's response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

Prevention

A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school's attention so that the school can address it *before* it becomes sufficiently severe, persistent, or pervasive to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond.

Prompt and Equitable Grievance Procedures

Schools are required by Title IX to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex.[81] Accordingly, regardless of whether harassment occurred, a school violates this requirement of Title IX if it does not have those procedures and policy in place.[82]

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties.[83] Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that that conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective.[84]

OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for—

(1) Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;

(2) Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;

(3) Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

(4) Designated and reasonably prompt timeframes for the major stages of the complaint process;

(5) Notice to the parties of the outcome of the complaint;[85] and

(6) An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.[86]

Many schools also provide an opportunity to appeal the findings or remedy or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment. During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document; including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities.[87] The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.[88] Because it is possible that an employee designated to handle Title IX complaints may him or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment.[89] While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them.[90] Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.[91]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.[92] OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a "prompt and equitable" resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact-gathering. However, because legal standards for criminal conduct are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly.[93] Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR.[94]

Finally, a public school's employees may have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to those accused of harassment. Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions. Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

First Amendment

In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved.[95] Free speech rights apply in the classroom (e.g., classroom lectures and discussions)[96] and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events[97]; and student newspapers, journals and other publications[98]). In addition, First Amendment rights apply to the speech of students and teachers.[99]

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.[100] In order to establish a violation of Title IX, the harassment must be sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.[101]

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently severe, persistent, or pervasive as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a

BEST COPY AVAILABLE

school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistent with the First Amendment.[102] As an example of the application of free speech rights to allegations of sexual harassment, consider the following:

Example 1: In a college level creative writing class, a professor's required reading list includes excerpts from literary classics that contain descriptions of explicit sexual conduct, including scenes that depict women in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer: Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals. Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2: A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students' conduct has created a hostile environment for girls on the bus and that they fear for their daughter's safety. What must the school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take reasonable and appropriate actions against the students, including disciplinary action if necessary, to remedy the hostile environment and prevent future harassment.

Footnotes

1. This Guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. If employees bring sexual harassment claims under Title IX, case law applicable to sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a), and Equal Employment Opportunity Commission (EEOC) guidelines will apply. *See* 28 CFR 42.604 (Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance).

2. 20 U.S.C. 1681 *et seq.*, as amended: 34 CFR 106.1, 106.31(a)(b). In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII. *See Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX); *Kinman* v. *Omaha Public School Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII principles in determining that a student was entitled to protection from hostile environment sexual harassment by a teacher in school under Title IX); *Doe* v. *Claiborne County*, 1996 WL 734583, *19 (6th Cir. December 26, 1996) (holding in a case involving allegations of hostile environment sexual harassment of a student by a teacher that Title VII agency principles apply to sexual harassment cases brought under Title IX); *Murray* v. *New York University College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995) (while finding notice lacking, court applied Title VII principles in assuming a Title IX cause of action for sexual harassment of a medical student by a patient visiting the school clinic); *Doe* v. *Petaluma City School Dist.*, 830 F.Supp. 1560, 1571–72 (N.D. Cal. 1993) (applying Title VII principles in determining that if school had notice of peer sexual harassment and failed to take appropriate corrective action, school liable under Title IX), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *Kadiki* v. *Virginia Commonwealth University*, 892 F.Supp. 746, 749 (E.D. Va. 1995) (in Title IX case involving allegations of both *quid pro quo* and hostile environment sexual harassment, court indicated that Title VII standards should be applied).

In addition, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title VII also apply to sexual harassment under Title IX. Indeed, Title IX was modeled on Title VI, *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979). For information on racial harassment, see the Department's Notice of Investigative Guidance for Racial Harassment, 59 FR 11448 (1994).

3. Consistent with Supreme Court decisions, *see Franklin*, 503 U.S. at 75 (expressly ruling that the sexual harassment of a student by a teacher violates Title IX), the Department has interpreted Title IX as prohibiting sexual harassment for over a decade. *Kinman*, 94 F.3d at 469 (Title IX prohibits hostile environment sexual harassment of student by teacher). Moreover, it has been OCR's longstanding practice to apply Title IX to peer harassment. *See also Bosley* v. *Kearney R–1 School Dist.*, 904 F.Supp. 1006, 1023 (W.D. Mo. 1995); *Doe* v. *Petaluma City School Dist., Plaintiff's Motion for Reconsideration Granted*, 1996 WL 432298 (N.D. Cal. July 22, 1996) (reaffirming Title IX liability for peer harassment if the school knows of the hostile environment but fails to take remedial action); *Burrow* v. *Postville Community School District*, 929 F.Supp. 1193, 1205 (N.D. Iowa 1996) (student may bring Title IX cause of action against a school for its knowing failure to take appropriate remedial action in response to the hostile environment created by students at the school); *Oona R.–S.* v. *Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Davis* v. *Monroe County Bd. of Education*, 74 F.3d 1186, 1193 (11th Cir. 1996) (as Title VII is violated if a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated if a sexually hostile educational environment is created by a fellow student or students and the supervising authorities knowingly failed to act to eliminate the harassment), *vacated, reh'g granted*, 91 F.3d 1418 (11th Cir. 1996); *cf. Murray*, 57 F.3d at 249 (while court finds no notice to school, assumes a Title IX cause of action for sexual harassment of a medical student by a patient visiting school clinic). *But see* note 27. Of course, OCR has interpreted Title IX as prohibiting *quid pro quo* harassment of students for many years. *See Alexander* v. *Yale University*, 459 F.Supp. 1, 4 (D.Conn. 1977), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

4. The term "employee" refers to employees and agents of a school. This includes persons with whom the school contracts to provide services for the school. *See Brown* v. *Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, while the standards applicable to peer sexual harassment are generally applicable to claims of student-on-student harassment, schools will be liable for the sexual harassment of one student by another student under the standards applicable to employee-on-student harassment if a student engages in sexual harassment as an agent or employee of a school. For instance, a school would be liable under the standards applicable to *quid pro quo* harassment if a student teaching assistant, who has been given the authority to assign grades, requires a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

5. *Alexander*, 459 F.Supp. at 4 (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); *Kadiki*, 892 F.Supp. at 752 (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute *quid pro quo* harassment); *see also Karibian* v. *Columbia University*, 14 F.3d 773, 777–79 (2nd Cir. 1994) (Title VII case).

6. *See e.g., Franklin*, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX

BEST COPY AVAILABLE

included kissing, sexual intercourse); *Meritor Savings Bank FSB* v. *Vinson*, 477 U.S. 57, 60–61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape sufficient to raise hostile environment claim under Title VII); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993) (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII); *Ellison* v. *Brady*, 924 F.2d 872, 873–74, 880 (9th Cir. 1991) (allegations sufficient to state a sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 903–4 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); *Kadiki*, 892 F.Supp. at 751 (professor's spanking of a university student may constitute sexual conduct under Title IX); *Doe* v. *Petaluma*, 830 F.Supp. at 1564–65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); *Denver School Dist. #1*, OCR Case No. 08–92–1007 (same as to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); *Nashoba Regional High School*, OCR Case No. 01–92–1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.)

7. *Davis*, 74 F.3d at 1194, *vacated, reh'g granted; Doe* v. *Petaluma*, 830 F.Supp. at 1571–73; *Moire* v. *Temple University School of Medicine*, 613 F.Supp. 1360, 1366 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986); *see also Vinson*, 477 U.S. at 67; *Lipsett*, 864 F.2d at 901; Racial Harassment Guidance, 59 FR 11449–50. *But see* note 27.

8. 34 CFR 106.8(b).

9. 20 U.S.C. 1687 (codification of Title IX portion of the Civil Rights Restoration Act of 1987).

10. *See also Shoreline School Dist.*, OCR Case No. 10–92–1002 (a teacher's patting student on arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); *Dartmouth Public Schools*, OCR Case No. 01–90–1058 (same as to contact between high school coach and students); *San Francisco State University*, OCR Case No. 09–94–2038 (same as to faculty advisor placing her arm around graduate student's shoulder in posing for a picture); *Analy Union High School Dist.*, OCR Case No. 09–92–1249 (same as to drama instructor who put his arms around both male and female students who confided in him.)

11. *Cf. John Does 1* v. *Covington County School Bd.*, 884 F.Supp. 462, 464–65 (M.D. Ala. 1995) (male students alleging that teacher sexually harassed and abused them stated cause of action under Title IX).

12. Title IX and the regulations implementing it prohibit discrimination "on the basis of sex;" they do not restrict sexual harassment to those circumstances in which the harasser only harasses members of the opposite sex in incidents involving either *quid pro quo* or hostile environment sexual harassment. *See* 34 CFR 106.31. In order for hostile environment harassment to be actionable under Title IX, it must create a hostile or abusive environment. This can occur when a student or employee harasses a member of the same sex. *See Kinman*, 94 F.3d at 468 (female student's alleging sexual harassment by female teacher sufficient to raise a claim under Title IX); *Doe* v. *Petaluma*, 830 F.Supp. at 1564–65, 1575 (female junior high school student alleging sexual harassment by other students, including both boys and girls, sufficient to raise claim under Title IX); *John Does 1*, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. *Chiapuzo* v. *BLT Operating Co.*, 826 F.Supp. 1334 (D. Wyo. 1993) (court found that such harassment could violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, *for that matter*, if a male student is repeatedly propositioned by a male student or employee). In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in *Chiapuzo*, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were gender-driven in that they were made with an intent to demean each member of the couple because of his or her respective sex. *See also Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1463–64 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 733 (1995) (Title VII case).

13. *Nashoba Regional High School*, OCR Case No. 01–92–1397. In *Conejo Valley School Dist.*, OCR Case No. 09–93–1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.

14. *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989, *cert. denied* 493 U.S. 1089 (1990) (Title VII case); *DeSantis* v. *Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (same); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (same).

15. *See Nabozny* v. *Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in case in which school district officials allegedly failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

16. *See Vinson*, 477 U.S. at 65–66; *Harris*, 114 S.Ct. at 370–371; *see also Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (Title VII case); *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (Title VII case; physical, but non-sexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex); *Cline* v. *General Electric Capital Auto Lease, Inc.*, 757 F.Supp. 923 (N.D. Ill. 1991) (Title VII case).

17. *See Harris*, 114 S.Ct. at 370–371; *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1485–86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); *see also Hall* v. *Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (Title VII case); *Hicks*, 833 F.2d at 1415; *Eden Prairie Schools, Dist. #272*, OCR Case No. 05–92–1174 (the boys made lewd comments about male anatomy *and* tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls.

18. The Supreme Court has ruled that agency principles apply in determining an employer's liability under Title VII for the harassment of its employees by supervisors. *See Vinson*, 477 U.S. at 72. These principles would govern in Title IX cases involving employees who are harassed by their supervisors. *See* 28 CFR 42.604 (regulations providing for handling employment discrimination complaints by Federal agencies; requiring agencies to apply Title VII law if applicable). These same principles should govern the liability of educational institutions under Title IX for the harassment of students by teachers and other school employees in positions of authority. *See Franklin*, 503 U.S. at 75.

19. The Supreme Court in *Vinson* did not alter the standard developed in the lower Federal courts whereby an institution is absolutely liable for *quid pro quo* sexual harassment whether or not it knew, should have known, or approved of the harassment at issue. 477 U.S. at 70–71; *see also Lipsett*, 864 F.2d at 901; EEOC Notice N–915–050, March 1990, Policy Guidance on Current Issues of Sexual Harassment, at p. 21. This standard applies in the school context as well. *Kadiki*, 892 F.Supp. at 752 (for the purposes of *quid pro quo* harassment of a student, professor is in similar position as workplace supervisor).

20. *Kadiki*, 892 F.Supp. at 754–755; *cf. Martin* v. *Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995) (Title VII case); *Karibian*, 14 F.3d at 777–78; *Henson* v. *City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (Title VII case).

BEST COPY AVAILABLE

21. *See* note 4.

22. Restatement (Second) Agency § 219(2)(d); *Martin*, 48 F.3d at 1352 (finding an employer liable under Title VII for sexual harassment of an employee in case in which the Manager used his apparent authority to commit the harassment; the Manager was delegated full authority to hire, fire, promote, and discipline employees and used the authority to accomplish the harassment; and company policy required employees to report harassment to the Manager with no other grievence process made available to them).

23. *See* Restatement (Second) of Agency § 219(2)(d); EEOC Policy Guidance on Current Issues of Sexual Harassment at p. 28; *Karibian*, 14 F.3d at 780; *Hirschfeld* v. *New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990) (Title VII case); *Martin*, 48 F.3d at 1352. *But see Rosa H* v. *San Elizario Ind. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997). In *San Elizario* the Fifth Circuit reversed a jury finding that a school district was liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student. The court held, contrary to OCR policy, that a school could not be found liable under Title IX pursuant to agency principles.

However, language in this and previous decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. In light of the evolving case law in the Fifth Circuit, adhering to the standards in the Guidance may be the best way for schools in these States to ensure compliance with the requirements of Title IX. School personnel should also consider whether State, local, or other Federal authority affects their obligations in these areas.

24. *Karibian*, 14 F.3d at 780 (employer would be liable for hostile environment harassment in case in which allegations were that a supervisor coerced employee into a sexual relationship by, among other things, telling her she "'owed him' for all he was doing for her as her supervisor"); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558–60 (11th Cir. 1987) (Title VII case holding employer liable for sexually hostile environment created by supervisor who repeatedly reminded the harassed employee that he could fire her if she did not comply with his sexual advances).

25. *Cf. Karibian*, 14 F.3d at 780.

26. *Id.*

27. The overwhelming majority of courts that have considered the issue of sexually hostile environments caused by peers have indicated that schools may be liable under Title IX for their knowing failure to take appropriate actions to remedy the hostile environment. *See* note 7 and peer hostile environment cases cited in note 3. However, one Federal Circuit Court of Appeals decision, *Rowinsky* v. *Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996), has held to the contrary. In that case, over a strong dissent, the court rejected the authority of other Federal courts and OCR's longstanding construction of Title IX and held that a school district is not liable under Title IX for peer harassment unless "the school district itself directly discriminated based on sex," i.e., the school responded differently to sexual harassment or similar claims of girls versus boys. For cases specifically rejecting the *Rowinsky* interpretation, *see e.g.*, *Doe* v. *Petaluma, Plaintiff's Motion for Reconsidemtion Granted*, 1996 WL 432298 *6 (N.D. Cal. 1996); *Burrow* v. *Postville Community School Dist.*, 929 F.Supp. at 1193.

OCR believes that the *Rowinsky* decision misinterprets Title IX. As explained in this Guidance, Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Notably, Title VII cases that hold that employers are responsible for remedying hostile environment harassment of one worker by a co-worker apply this same standard. *See, e.g.*, *Ellison* v. *Brady*, 924 F.2d at 881–82; *Hall* v. *Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986); *Snell v. Suffolk*, 782 F.2d 1094 (2nd Cir. 1986); *Robinson* v. *Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

Language in subsequent decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, the better practice is for these schools to follow the Guidance. Thus, schools should take prompt corrective action to address peer harassment of which they knew or should have known. Indeed, following the Guidance may be the safest way for schools in these States to ensure compliance with the requirements of Title IX.

28. *See* Restatement (Second) of Agency § 219(2)(b).

29. As with peer harassment by its own students, a school's liability for the harassment of its students by third parties is based on its obligation to provide an environment free of discrimination. *Murray*, 57 F.3d at 250 (student participating in university dental clinic providing services to the public alleged harassment by a patient; while the court ruled in defendant's favor because of lack of notice, it considered such a claim actionable under Title IX); Racial Harassment Investigative Guidance, 59 FR 11450 (referring to harassment by neighborhood teenagers, guest speaker, and parents). *See, e.g.*, 29 CFR 1604.11(e); *Sparks* v. *Regional Medical Ctr.*, 792 F.Supp. 735, 738 n.1 (N.D. Ala. 1992) (Title VII case); *Powell* v. Las Vegas Hilton Corp., 841 F.Supp. 1024, 1027–28 (D. Nev. 1992) (Title VII case); *Magnuson* v. *Peak Technical Servs., Inc.*, 808 F.Supp. 500, 512–13 (E.D. Va. 1992) (Title VII case); *EEOC* v. *Sage Realty Corp.*, 507 F.Supp. 599, 611 (S.D.N.Y. 1981) (Title VII case); *cf. Dornhecker* v. *Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987) (assuming Title VII required employer to respond appropriately to sexual harassment of an employee by a contractor, but finding employer's response sufficient). *See also* Restatement (Second) of Agency § 219(2)(b).

30. For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. *Cf. Danna* v. *New York Telephone Co.*, 752 F.Supp. 594, 611 (S.D.N.Y. 1990) (telephone company in violation of Title VII for not taking sufficient action to protect its own employee from sexually explicit graffiti at the airport where she was assigned to work, e.g., contacting airport management to see what remedial measures could be taken).

31. 34 CFR 106.8(b) and 106.9.

32. *See* Racial Harassment Investigative Guidance, 59 FR 11450; *Murray*, 57 F.3d at 249 (an employer is liable for the harassment of co-workers if the employer "either providnd no reasonable avenue for complaint or knew of the harassment but did nothing about it".

33. EEOC Policy Guidance at p. 25 ("* * * in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.")

34. 34 CFR 106.8(b).

35. If OCR finds a violation of Title IX, it will seek to obtain an agreement with the school to voluntarily correct the violation. The agreement will set out the specific steps the school will take and provide for monitoring by OCR to ensure that the school complies with the agreement. Schools should note that the Supreme Court has held that monetary damages are available as a remedy in private lawsuits brought to redress violations of Title IX. *Franklin*, 503 U.S. at 76. Of course, a school's immediate and appropriate remedial actions are relevant in determining the nature and extent of the damages suffered by a plaintiff.

36. *Henson*, 682 F.2d at 903 (Title VII case).

37. [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII * * *. The correct inquiry is whether [the

BEST COPY AVAILABLE

subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. *Vinson*, 477 U.S. at 68.

38. *Lipsett*, 864 F.2d at 898 (while, in some instances, a person may have responsibility for telling the harasser directly that the conduct is unwelcome, in other cases a "consistent failure to respond to suggestive comments or gestures may be sufficient * * *."); *Danna*, 752 F.Supp. at 612 (despite female employee's own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); *see also Carr* v. *Allison Gas Turbine Div., GMC*, 32 F.3d 1007, 1011 (7th Cir. 1994) (Title VII case: cursing and dirty jokes by female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: "Even if * * * [the employee's] testimony that she talked and acted as she did [only] in an effort to be one of the boys' is * * * discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct * * *. The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms * * * could not be deeply threatening.").

39. *Reed* v. *Shepard*, 939 F.2d 484, 486–87, 491–92 (7th Cir. 1991) (no harassment found under Title VII in case in which female employee not only tolerated, but also participated in and instigated the suggestive joking activities about which she was now complaining); *Weinsheimer* v. *Rockwell Int'l Corp.*, 794 F.Supp. 1559, 1563–64 (M.D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere). However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

40. The school bears the burden of rebutting the presumption.

41. Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees.

42. *See* note 41.

43. In *Harris*, the Supreme Court explained the requirement for considering the "subjective perspective" when determining the existence of a hostile environment. The Court stated: "* * * if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 114 S.Ct. at 370.

44. The Supreme Court used a "reasonable person" standard in *Harris*, 114 S.Ct. at 370–71 to determine whether sexual conduct constituted harassment. This standard has been applied under Title VII to take into account the sex of the subject of the harassment, *see, e.g.*, *Ellison*, 924 F.2d at 878–79 (applying a "reasonable women" standard to sexual harassment), and has been adapted to sexual harassment in education. *Davis*, 74 F.3d at 1126 (relying on *Harris* to adopt an objective, reasonable person standard), *vacated, reh'g granted*; *Patricia H.* v. *Berkeley Unified School Dist.*, 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a "reasonable victim" standard and referring to OCR's use of it); Racial Harassment Guidance, 59 FR 11452 (the standard must take into account the characteristics and circumstances of victims on a case-by-case basis, particularly the victim's race and age).

45. *Harris*, 114 S.Ct. at 371; *See* Racial Harassment Guidance, 59 FR 11449 and 11452; *Brock* v. *United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (Title VII case); *Simon* v. *Morehouse Sch. of Medicine*, 908 F.Supp. 959, 969–970 (N.D. Ga. 1995) (Title VII case); *Al-Dabbagh* v. *Greenpeace, Inc.*, 873 F.Supp. 1105, 1111–12 (N.D. Ill. 1994) (Title VII case); *Watts* v. *N.Y.C. Police Dept.*, 724 F.Supp. 99, 104 (S.D.N.Y. 1989) (Title VII case).

46. *Davis*, 74 F.3d at 1126 (no Title IX violation unless the conduct has "actually altered the conditions of [the student's] learning environment"), *vacated, reh'g granted*; *Lipsett*, 864 F.2d at 898 (" altered" the educational environment); *Patricia H.*, 830 F. Supp. at 1297 (sexual harassment could be found where conduct interfered with student's ability to learn); *see also Andrews*, 895 F.2d at 1482 (Title VII case).

47. *Harris*, 114 S.Ct. at 371.

48. *See e.g.*, *Doe* v *Petaluma*, 830 F. Supp at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school); *Modesto City Schools*, OCR Case No. 09–93–1391 (evidence showed that one girl's grades dropped while the harassment was occurring); *Weaverville Elementary School*, OCR Case No. 09–91–1116 (students left school due to the harassment). *Compare with College of Alameda*, OCR Case No. 09–90–2104 (student not in instructor's class and *no* evidence of any effect on student's educational benefits or services, so no hostile environment).

49. *Doe* v. *Petaluma*, 830 F. Supp. at 1566.

50. *See Harris*, 114 S.Ct. at 371, in which the Court held that tangible harm is not required. In determining whether harm is sufficient, several factors are to be considered, including frequency, severity, whether the conduct was threatening or humiliating versus a mere offensive utterance, and whether it unreasonably interfered with work performance. No single factor is required; similarly, psychological harm, while relevant, is not required.

51. *See Modesto City Schools*, OCR Case No. 09–93–1391 (evidence showed that several girls were afraid to go to school because of the harassment).

52. *Summerfield Schools*, OCR Case No. 15–92–1029.

53. *See Waltman* v. *Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (Title VII case); *see also Hall*, 842 F.2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII); Racial Harassment Investigative Guidance, 59 FR 11453.

54. *See, e.g.*, *Andrews*, 895 F.2d at 1484 ("Harassment is pervasive when 'incidents of harassment occur either in concert or with regularity'."); *Moylan* v. *Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (Title VII case); *Downes* v. *Federal Aviation Administration*, 775 F.2d 288, 293 (D.C. Cir. 1985) (same); *cf.* *Scott* v. *Sears, Roebuck and Co.*, 798 F.2d 210, 214 (7th Cir. 1986) (Title VII case; conduct was not pervasive or debilitating).

55. The U.S. Equal Employment Opportunity Commission (EEOC) has stated: "The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC Policy Guidance on Current Issues of Sexual Harassment, p. 17. *See also Barrett* v. *Omaha National Bank*, 584 F. Supp. 22, 30 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (hostile environment created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker's talking to plaintiff about sexual activities and touching her in offensive manner while they were inside a vehicle from which she could not escape).

56. *See also Ursuline College*, OCR Case No. 05–91–2068 (A single incident of comments on a male student's muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment).

57. *Patricia H.*, 830 F.Supp. at 1297 ("grave disparity in age and power" between teacher and student contributed to the creation of a hostile environment); *Summerfield Schools*, OCR Case No. 15–92–1929 ("impact of the * * * remarks was heightened by the fact that the coach is an adult in a position of authority"); *cf. Doe* v. *Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 70 (1994) (Sec. 1983 case; in finding that a sexual relationship between a high school teacher and a student was unlawful, court considered the influence that the teacher had over the student by virtue of his position of authority).

58. *See, e.g.*, *McKinney*, 765 F.2d at 1138–40; *Robinson*, 760 F. Supp. at 1522.

59. *Cf. Patricia H.*, 830 F. Supp. at 1297.

60. *See also Barrett*, 584 F. Supp. at 24 (harassment occurring in a car from which the plaintiff could not escape was deemed particularly severe).

61. *See also Hall*, 842 F.2d at 1015 (incidents of sexual harassment directed at other employees); *Hicks*, 833 F.2d at 1415–16 (same). *Cf. Midwest City-Del City Public Schools*, OCR Case No. 06–92–1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).

62. *See* note 17. In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. *Hicks*, 833 F.2d at 1416;

BEST COPY AVAILABLE

Jefferies v. *Harris Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (Title VII case).

63. In addition, even if there is no notice, schools may be liable for sexual harassment. *See* previous discussions of liability in situations involving *quid pro quo* harassment and hostile environment sexual harassment by employees in situations in which the employee acted with apparent authority or was aided in carrying out the harassment of students by his or her position of authority with the school.

64. *See Ellison* v. *Brady*, 924 F.2d 872, 881 (9th Cir. 1991), quoting *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1515–1516 (9th Cir. 1989) (Title VII cases); *Swentek* v. *USAir*, 830 F.2d 552, 558 (4th Cir. 1987), quoting *Katz* v. *Dole*, 709 F.2d at 255 (Title VII cases).

But see Rosa H. v. *San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997) and note 23. In *San Elizario*, the Fifth Circuit held, among other things, that liability for hostile environment harassment cannot attach if the school has only constructive notice of the harassment. *See* note 23.

65. Whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student.

With respect to the notice provisions applicable to schools under Title IX, one Federal Circuit Court of Appeals decision, *Canutillo Indep. School Dist.* v. *Leija*, 101 F.3d 393, 398–400 (5th Cir. 1996), has held, contrary to OCR policy, that a school district was not liable in a case in which one of its teachers sexually molested a second grade student, because the student and her mother only reported the harassment to her homeroom teacher. Notwithstanding that a school handbook instructed students and parents to report complaints to the child's primary or homeroom teacher, the court held that notice must be given to "someone with authority to take remedial action." *See also Rosa H.* v. *San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997), and notes 23 and 64. In *San Elizario*, the Fifth Circuit held, among other things, that although the fifteen-year-old student, whose karate instructor had repeatedly initiated sexual intercourse, "was subject to discrimination on the basis of sex," a school district is only liable if an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Based on these and other decisions, Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, it is the better practice for these schools to follow the Guidance. For example, the better practice is for schools to ensure that teachers and other personnel recognize and report sexual harassment of students to the appropriate school staff so that schools can take prompt corrective action and ensure a safe educational environment. In addition, the Guidance makes clear that providing students with several avenues to report sexual harassment is a very helpful means for addressing and preventing sexually harassing conduct in the first place. Schools in States in the Fifth Circuit should also consider whether State, local or other Federal laws may affect their responsibilities in this regard.

66. Racial Harassment Guidance, 59 FR 11450 (discussing how a school may receive notice).

67. *See Yates* v. *Avco Corp.*, 819 F.2d 630, 634–36 (6th Cir. 1987) (Title VII case); *Katz* v. *Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (same); *See also* Racial Harassment Investigative Guidance, 59 FR 11450.

68. *Cf. Katz*, 709 F.2d at 256 (the employer "should have been aware of the * * * problem both because of its pervasive character and because of Katz' specific complaints * * *"); *Smolsky* v. *Consolidated Rail Corp.*, 780 F. Supp. 283, 293 (E.D. Pa. 1991), *reconsideration denied*, 785 F. Supp. 71 (E.D. Pa. 1992) ("where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment" under Title VII); *Jensen* v. *Eveleth Taconite Co.*, 824 F. Supp. 847, 887 (D. Minn. 1993) (Title VII case; "[s]exual harassment * * * was so pervasive that an inference of knowledge arises * * *. The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert"); *Cummings* v. *Walsh Construction Co.*, 561 F. Supp. 872, 878 (S.D. Ga. 1983) ("* * * allegations not only of the [employee] registering her complaints with her foreman * * * but also that sexual harassment was so widespread that defendant had constructive notice of it" under Title VII); *but see Murray*, 57 F.3d at 250–51 (that other students knew of the conduct was not enough to charge the school with notice, particularly in case in which these students may not have been aware that the conduct was offensive or abusive).

69. Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

70. In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school's policies, it may be appropriate for the school to intervene without contacting the other students. It may still be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

71. *Cf. Bundy* v. *Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); *accord*, *Jones* v. *Flagship Int'l*, 793 F.2d 714, 719–720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII). Racial Harassment Investigative Guidance, 59 FR 11450.

72. *Waltman* v. *Int'l Paper Co.*, 875 F.2d at 479 (appropriateness of employer's remedial action under Title VII will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps); *Dornhecker* v. *Malibu Grand Prix Corp.*, 828 F.2d 307, 309–10 (5th Cir. 1987) (Title VII case; employer arranged for victim to no longer work with alleged harasser).

73. *Intlekofer* v. *Turnage*, 973 F.2d 773 (9th Cir. 1992) (Title VII case) (holding that the employer's response was insufficient and that more severe disciplinary action was necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior).

74. Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. *See* 20 U.S.C. 1092(f).

75. *See* note 30.

76. University of California at Santa Cruz, OCR Case No. 09–93–2141 (extensive individual and group counseling); *Eden Prairie Schools, Dist. #272*, OCR Case No. 05–92–1174 (counseling).

77. Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. *Fuller* v. *City of Oakland*, 47 F.3d 1522, 1528–29 (9th Cir. 1995).

78. 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100.7(e). Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

79. *Tacoma School Dist. No. 10*, OCR Case No. 10–94–1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, school committed as part of corrective action plan to providing training for students); *Los Medanos College*, OCR Case No. 09–84–2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); *Sacramento City Unified School Dist.*, OCR Case No. 09–83–1063 (same as to workshops for management and administrative personnel, in-service training for non-management personnel).

80. In addition, if information about the incident is contained in an "education record" of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student's consent. *Id.* In evaluating whether FERPA would limit disclosure, the Department does not interpret

BEST COPY AVAILABLE

FERPA to override any federally protected due process rights of a school employee accused of harassment.

81. 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975. Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies with the school district. At the postsecondary level, there may be a procedure for a particular campus or college, or for an entire university system.

82. *Fenton Community High School Dist. # 100*, OCR Case 05–92–1104.

83. While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

84. *See Vinson*, 477 U.S. at 72–73.

85. It is the Department's current position under the Family Educational Rights and Privacy Act (FERPA) that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student's education record unless—(1) the information directly relates to the complainant (e.g., an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. *See* note 80. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school's ability to inform the complainant of any disciplinary action taken.

86. The section in the Guidance on "Recipient's Response" provides examples of reasonable and appropriate corrective action.

87. 34 CFR 106.8(a).

88. *Id.*

89. *See Vinson*, 477 U.S. at 72–73.

90. *University of California, Santa Cruz*, OCR Case No. 09–93–2141; *Sonoma State University*, OCR Case No. 09–93–2131. This is true for formal as well as informal complaints. *See University of Maine at Machias*, OCR Case No. 01–94–6001 (school's new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions). These records need not be kept in a student's or employee's individual file, but instead may be kept in a central confidential location.

91. For example, in *Cape Cod Community College*, OCR Case No. 01–93–2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator.

92. Indeed, in *University of Maine at Machias*, OCR Case No. 01–94–6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated. While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

93. *Academy School Dist. No. 20*, OCR Case No. 08–93–1023 (school's response determined to be insufficient in case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01–93–1123 (not sufficient for school to wait until end of police investigation).

94. *Cf. EEOC* v. *Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir.) (Title VII case), *cert. denied*, 113 S.Ct. 299 (1992); *Johnson* v. *Palma*, 931 F.2d 203 (2nd Cir. 1991) (same).

95. The First Amendment applies to entities and individuals that are State actors. The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution. *See Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

96. *See, e.g., George Mason University*, OCR Case No. 03–94–2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment); *Portland School Dist. 1J*, OCR Case No. 10–94–1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment).

97. *See Iota Xi Chapter of Sigma Chi Fraternity* v. *George Mason University*, 993 F.2d 386 (4th Cir. 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

98. *See Florida Agricultural and Mechanical University*, OCR Case No. 04–92–2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student's viewpoint on white students on campus).

99. *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); *Cf. Cohen* v. *San Bernardino Valley College*, (college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy); *George Mason University*, OCR Case No. 03–94–2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment).

100. *See, e.g., University of Illinois*, OCR Case No. 05–94–2104 (fact that university's use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI).

101. *See Vinson*, 477 U.S. at 67 (the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficient degree to violate Title VII), quoting *Henson*, 682 F.2d at 904; *cf. R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) (citing with approval EEOC's sexual harassment guidelines).

102. *Compare Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that "[t]he undoubted freedom to advocate unpopular and controversial issues in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."), *with Iota XI* 993 F.2d 386 (holding that, notwithstanding a university's mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).

[FR Doc. 97–6373 Filed 3–12–97; 8:45 am]

BILLING CODE 4000–01–P

BEST COPY AVAILABLE

CHAPTER 38—DISCRIMINATION BASED ON SEX OR BLINDNESS

Sec.

1681. Sex.
    - (a) Prohibition against discrimination; exceptions.
        - (1) Classes of educational institutions subject to prohibition.
        - (2) Educational institutions commencing planned change in admissions.
        - (3) Educational institutions of religious organizations with contrary religious tenets.
        - (4) Educational institutions training individuals for military services or merchant marine.
        - (5) Public educational institutions with traditional and continuing admissions policy.
        - (6) Social fraternities or sororities; voluntary youth service organizations.
        - (7) Boy or Girl conferences.
        - (8) Father-son or mother-daughter activities at educational institutions.
        - (9) Institution of higher education scholarship awards in "beauty" pageants.
    - (b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.
    - (c) "Educational institution" defined.
1682. Federal administrative enforcement; report to Congressional committees.
1683. Judicial review.
1684. Blindness or visual impairment; prohibition against discrimination.
1685. Authority under other laws unaffected.
1686. Interpretation with respect to living facilities.
1687. Interpretation of "program or activity".
1688. Neutrality with respect to abortion.

CROSS REFERENCES

Applicability to—
  Community mental health services for the homeless, see 42 USCA § 290 cc-34.
  Family Violence Prevention and Services Act, see 42 USCA § 10406.
  Job Training Partnership Act, see 29 USCA § 1577.
  Maternal and child health services block grants, see 42 USCA § 708.
  Preventative health and health services block grants, see 42 USCA § 300w-7.
  Women's Education Equity Act, see 20 USCA §§ 3041, 3042.
Services of College Construction Loan Insurance Association, see 20 USCA § 1132f-1.

WESTLAW COMPUTER ASSISTED LEGAL RESEARCH

WESTLAW supplements your legal research in many ways. WESTLAW allows you to

BEST COPY AVAILABLE

- update your research with the most current information
- expand your library with additional resources
- retrieve direct history, precedential history and parallel citations with the Insta-Cite service

For more information on using WESTLAW to supplement your research, see the WESTLAW Electronic Research Guide, which follows the Explanation.

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub. L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Act. House Report No. 92-554, Senate Report No. 92-604, and Senate Conference Report No. 92-798, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

1974 Act. House Report No. 93-1056 and Senate Conference Report No. 93-1409, see 1974 U.S.Code Cong. and Adm.News, p. 6779.

1976 Act. Senate Report No. 94-882. and House Conference Report No. 94-1701, see 1976 U.S.Code Cong.and Adm.News, p. 4713.

1979 Act. Senate Report No. 96-49 and House Conference Report No. 96-459, see 1979 U.S.Code Cong.and Adm.News, p. 1514.

References in Text

This chapter, referred to in subsecs. (b) and (c), was in the original "this title", meaning title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

Amendments

1986 Amendment. Subsec. (a)(6)(A). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "Title 26" thus requiring no change in text.

1976 Amendment. Subsec. (a). Pub.L. 94-482 in par. (6) substituted "this" for "This", and added pars. (7) to (9).

1974 Amendment. Subsec. (a). Pub.L. 93-568 added par. (6).

Effective Dates

1976 Act. Section 412(b) of Pub.L. 94-482 provided that: "The amendment made by subsection (a) [to this section] shall take effect upon the date of enactment of this Act [Oct. 12, 1976]."

1974 Act. Section 3(b) of Pub.L. 93-568 provided that: "The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972."

Transfer of Functions

"Secretary" was substituted for "Commissioner" in subsec. (a)(2) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

Short Title

1988 Amendment. Pub.L. 100-259, § 1, Mar. 22, 1988, 102 Stat. 28, provided that: "This Act [enacting sections 1687 and 1688 of this title and section 2000d-4a of Title 42, The Public Health and Welfare, amending sections 706 and 794 of Title 29, Labor, and section 6107 of Title 42, and enacting provisions set out as notes under sections 1687 and 1688 of this title] may be cited as the 'Civil Rights Restoration Act of 1987'."

Construction

Enactment of sections 1687 and 1688 of this title by Pub.L. 100-259 not to be construed to extend the application of title IX of the Education Amendments of 1972 [Pub.L. 92-318] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see Pub.L. 100-259, § 7, Mar. 22, 1988, 102 Stat. 31, set out as a note under section 1687 of this title.

Coordination of Implementation and Enforcement of Provisions

For provisions relating to the coordination of implementation and enforcement of the provisions of this chapter by the Attorney General, see section 1-201(b) of Ex.Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

Regulations; Nature of Particular Sports: Intercollegiate Athletic Activities

Pub.L. 93-380, Title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, provided that the Secretary prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.

Educ. of School Dist. 23, D.C.Ill.1982, 545 F.Supp. 376.

Resolution enacted by section of state public high school association prohibiting participation of male students on girls' interscholastic volleyball teams was in harmony with this section and regulations of Commissioner of Education and was discernible and permissible means toward redressing disparate treatment of female students in scholastic athletic programs, and resolution was not arbitrary or capricious, abuse of discretion or an error of law. Forte v. Board of Ed., North Babylon Union Free School Dist., 1980, 431 N.Y.S.2d 321, 105 Misc.2d 36.

Thrust of this chapter and regulations promulgated thereunder is directed to overall program rather than to each individual sport offered at affected institution of learning. Mularadelis v. Haldane Central School Bd., 1980, 427 N.Y.S.2d 458, 74 A.D.2d 248.

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92-318, Title IX, § 902, June 23, 1972, 86 Stat. 374.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Act. House Report No. 92-554, Senate Report No. 92-604, and Senate Conference Report No. 92-798, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

Delegation of Functions

Functions of the President relating to approval of rules, regulations, and orders of general applicability under this section, were delegated to the Attorney General, see section 1-102 of Ex.Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

Construction

Enactment of sections 1687 and 1688 of this title by Pub.L. 100-259 not to be construed to extend the application of title IX of the Education Amendments of 1972 [Pub.L. 92-318] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see Pub.L. 100-259, § 7, Mar. 22, 1988, 102 Stat. 31, set out as a note under section 1687 of this title.

LIBRARY REFERENCES

Administrative Law

Education programs or activities, discrimination on basis of sex prohibited, see 7 C.F.R. § 15a.21 et seq.

Regulation and enforcement, see West's Federal Practice Manual § 12201 et seq.

American Digest System

Discrimination prohibited in public education, see Civil Rights ⚷127, 128.

Federal administrative agencies and proceedings, see Civil Rights ⚷182.

Encyclopedias

Discrimination in federally assisted programs, see C.J.S. Civil Rights § 56.

Discrimination prohibited in public education, see C.J.S. Civil Rights § 32.

Federal administrative agencies and proceedings, see C.J.S. Civil Rights § 88.

Law Reviews

Grove City College v. Bell: The weakening of Title IX. Comment, 20 New England L.Rev. 805 (1984-1985).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Authority of Department 1
Effect of employment discrimination on students 2
Funding termination on program-by-program basis 3

1. Authority of Department

Department of Health, Education and Welfare [now Department of Education] had authority to require census of the labor pool from city board of education, with which it had come to agreement obligating the board to change its teacher employment and assignment policies in order to remedy discrimination found through investigation by Department's Office for Civil Rights. Caulfield v. Board of Ed. of City of New York, C.A.N.Y.1980, 632 F.2d 999, certiorari denied 101 S.Ct. 1739, 450 U.S. 1030, 68 L.Ed.2d 225.

2. Effect of employment discrimination on students

Department of Health, Education and Welfare [now Department of Education] could reasonably proceed under this chapter on theory that school employment practices which involved system-

BEST COPY AVAILABLE

CURRENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

REMARKS OF
MELVIN H. OSTERMAN
WHITEMAN OSTERMAN & HANNA
at the
CASDA SCHOOL LAW CONFERENCE
Century House
July 17, 1997

When one puts together a topic such as this, the temptation is to keep score. Has it been a good year or a bad year for school districts? The answer for 1997, as it is for most years, is that it was a mixed year. There is some good news, a little bad and a lot of clarification of unusually muddled issues. Having been in this business for 40 years, by now I'm content with just staying even.

I'd like to talk to you this morning about ten of these cases.

1. Services to Students in Private and Parochial Schools

AGOSTINI v. FELTON, _U.S._, 65 LW 4524 (June 28, 1997)

Agostini is good news. It overrules, by a 5-4 vote, Aguilar v. Felton. The decision holds that Title I (and probably special education) services may be provided on the premises of a private or parochial school without violating the First Amendment to the United States Constitution (Establishment of Religion). New York City estimates it spent $100 million between 1987 and 1994 to provide "Aguilar Services" at rented space, and in vans and other makeshift facilities outside of the school buildings attended by children receiving services. One off shoot of the decision is that it may end the furor surrounding Kyrias Joel.

Regulations are promised by the U.S. Office of Education and SED. Many issues remain unresolved. For example:

> Does the scope of the decision extend to special education services (probably, yes)?
>
> Presence of religious symbols in space where public services are provided (probably, no)?
>
> Can, for example, a consultant teacher or interpreter for the deaf participate in the portion of the day in which religious subjects are taught (probably, no)?

In any event, even for this September, you ought to consider the way you deliver services in private and parochial schools. One other possible consideration is whether parents who have rejected special services because they did not want their child transported to a neutral site, will now demand services in the private or parochial school.

2. Age Based Discrimination

EEOC v. CROWN POINT COMMUNITY SCHOOL, 72 FEP Cases 1803 (D.Ct. N.D. IN, 1/3/97)

Age based conditions in early retirement incentives violate the Age Discrimination in Employment Act. In this case the District's negotiated plan called for reductions in retirement benefits each year until the incentive was ended at age 65. Although the ADEA speaks to early retirement incentives, the courts are still all over the lot concerning what is permitted. One thing is clear. Cost advantages cannot justify age based discrimination.

NYSUT is pushing a "first five years of eligibility" provision as a substitute for age 55-60 windows contained in many District early retirement incentives. The language works fine for Tiers I and II. It is less satisfactory for Tiers III and IV where the retirement eligibility date is 65.

In Auerbach v. Harborfields CSD, 95-CV-866 (1996) a District Court on Long Island upheld a plan which required a teacher to retire (1) in the year he or she attained 55 years of age with 20 years of service or (2) if he or she was older than 55, in the year he or she completes 20 years of service. Harborfields works but it is a one-shot deal–the teacher must retire in a specific year. The lack of a five year window has been a deterrent to acceptance of this plan by some NYSUT locals.

3. Prevailing Rate of Wage and Summer Employment.

Section 220 of the Labor Law requires contractors who undertake school district construction to pay their non-unionized workers the "prevailing rate of wage," that is the wage paid in the area pursuant to collective bargaining agreements between employers and their unionized employees. At times the results, as applied by the State Department of Labor, are bizarre. In one case we represented a company which undertook the repair of student lockers. The Department of Labor took the position that the contractor was required to pay sheet metal workers' wages–even though the Department conceded that sheet metal work was not involved. The Department reasoned it had to find a pigeon hole and that sheet metal work was close enough.

The Department seems to be on a roll. In a recent program a representative of the Department took the position that students who were hired by school districts to assist in repair projects over the summer were to be paid the prevailing rate, as defined by contracts between contractors and the International Laborers Union. How absurd! I point this out to you not with a view that it is "truth," but because you ought to have some concern when the inspector comes to call and starts talking silly.

4. Tenure Areas

ABRANTES V. NORWOOD-NORFOLK CSD, 649 NYS2d 957 (3rd Dept. 1996)

Since 1975 school districts have been required to make tenure appointments in the specific tenure areas set forth in Part 30 of the Commissioner's Regulations. Two factors complicate the law in this area. Some school districts simply have not gotten the message and persist in making up their own logical but unjustified tenure areas. Secondly, technology and pedagogy have changed in the 22 years since Part 30 was written but the regulations have not been amended to accommodate these changes. Gifted and Talented or ALP programs are examples of relatively recently developed assignments which do not mesh neatly with the Part 30 pigeonholes.

Abrantes is an example of this. Abrantes was appointed as a K-12 teacher in the "Computer" tenure area. She held K-6 certification, but provided only backup assistance to elementary teachers. The only instruction she provided directly was at the high school level.

The Appellate Division, our intermediate appellate court, spent little time in concluding that "computer" is not a recognized tenure area. What may be more interesting for our purposes is the court's conclusion that the matter should be remanded to the Board of Education to review the teacher's plan books in order to reappoint her in the proper tenure area. The Court did not undertake this task itself—perhaps because it did not know the answer.

5. The Division of Human Rights.

DIAZ CHEMICAL CORP. v. DIVISION OF HUMAN RIGHTS, 654 NYS2d 907 (4th Dept. 1997)

This case, brought by an employee who asserted she had been fired because she became pregnant, makes a bad situation worse. The Executive Law contains strict guidelines, fixing the times within the Division of Human Rights is expected to complete processing of claims filed with the Agency. In general, claims are to be resolved in about a year. In Diaz the Division missed that goal by a bit—13 years to be exact. In that period, for example, the back pay claim of a $10,000 a year clerk had grown to $140,000.

The Appellate Division had previously permitted a similar award to stand even though the Division had taken eight years to complete processing of a case. In Diaz, the court, by a 3-2 vote, approved a 14 year delay in the absence of proof that the employer had been prejudiced by the delay.

Then tendency whenever you're a respondent is to keep a low profile, with a view that delay works to your advantage. Diaz suggests that sometimes delay, by making a simple claim much more expensive, may not serve your interests.

6. The Fair Labor Standards Act

AUER v. ROBBINS, 117 S.Ct. 905 (1997)

Auer holds out the possibility of relief from a threat which has been hanging over school district's heads for some period of time. Your teachers are, by definition, excluded from the overtime provisions of the Fair Labor Standards Act. They are professionals and therefore exempt. Many of your non-instructional employees are clearly covered by the Act and therefore you must pay them overtime (at time and one-half) when they work more than 40 hours a week.

There is a middle group. Some of your more senior civil service law employees, your business manager for example, may be exempt under the "bona fide executive, administrative or professional" exemption to the FLSA. To meet that test, the employer must establish that the employee is paid on a "salary basis." The statute provides that, to meet this test, the employee's salary must not be subject to reductions because of the quantity or quality of work performed. That requirement, in turn, has been interpreted to include a requirement that the employee's pay cannot be docked for a day or less because of absence or disciplinary reasons.

If that test were applied literally to public employees it would end the FLSA exemption for almost all of your high level civil service administrators. In the public sector we are accustomed to deductions of days of sick or personal leave. Public accountibility requires specific grants of specific kinds of leave. Often employees are placed on unpaid leave if allowed maximums are exceeded. The salary basis test just was not written for this context.

Auer holds out the possibility of a pragmatic solution. In Auer the claim was made that police lieutenant's were overtime eligible because they were subject to disciplinary deductions if found guilty of misconduct. The mere possibility was sufficient, according to the Secretary of Labor, to defeat the exemption. The Supreme Court took a more practical approach. It reviewed the files of the St. Louis Police Department and determined that there had never been a case where an officer had been docked for a disciplinary infraction. It found, therefore, that a theoretical assault on the salary basis test must be rejected. Even more hopefully, the Court suggested that, in a future case, it would consider whether the salary basis test should continue to be applied to the public sector.

7. **Pre-Suspension Hearings**

GILBERT v. HOMER, __U.S.__ (June 9, 1997)

Gilbert speaks to a problem that cuts across Education Law and arbitration. Both 3020-a of the Education Law and Section 75 of the Civil Service Law authorize the suspension of an employee, with or without pay, during the pendency of a disciplinary proceeding. This is rarely an issue in Education Law proceedings since, in most cases, the suspension must be with pay. Do the rules change if the suspension is without pay, as Section 75 of the CSL permits?

At issue in Gilbert was whether a suspended campus security officer should have been given a hearing before he was suspended without pay during the pendency of criminal charges against him. The Supreme Court held that he was not, but on very narrow grounds. The Circuit Court of appeals had held that a suspension without pay must always be preceded by notice and some form of hearing. The Supreme Court reversed, concluding that because the employee's position was "high profile" the

College had an interest in immediate suspension. The fact that the employee had been indicted by a grand jury also was found by the Court to be some assurance that a suspension was appropriate. The grant jury proceeding was, in the view, a form of hearing.

Tied in with these due process concerns are the decisions of a number of arbitrators who have ruled that "industrial due process" requires that you at least speak to the employee to get his or her point of view before you initiate a disciplinary action. I am not sure I agree with the reasoning. It is a minority position, but from time to time you will confront an arbitrator (or an advocate for an accused employee) who espouses this view.

Gilbert and the views of these arbitrators combine to suggest that you consider a meeting with an employee if you are considering a suspension without pay. to hear their side of the story. In a unionized situation, Section 75 also requires that you advise them of their right to union representation.

8. Preferred Eligible Lists

AVILA v. NORTH BABYLON UFSD, 169 M.2d 761 (Sup.Ct. Nassau County 1996)

Avila is an interesting and important layoff case. In June of 1987 Avila's English position was abolished and she was placed on a seven year preferred eligible list. Another teacher retired and she was reinstated to a full-time English position for the 1987-88 school year. That position was abolished in June of 1988 and a new preferred eligible list was established. After five years on the preferred eligible list, a part-time English position opened and Avila was appointed to that position. She served in that part-time position until June 30, 1995, at which time the part-time position was abolished. On July 1, 1995, the next day, a full-time English position opened and the Board appointed another teacher to fill it. Avila sued.

At issue was the date from which Avila's seven year preferred eligible list rights was to be computed. The District argued that her rights expired on June 30, 1995, seven years after the abolition of her second full-time position in 1988. The Court disagreed. Describing the case as one of first impression, the Court concluded that the full- or part- time character of the position was irrelevant. When Avila's part-time position was abolished in 1995 she commenced a new seven year period of eligibility.

Avila changes the ground rules under which many of us have operated. It clearly will be appealed and it is not the last word on this subject. It is, however, a case you ought to think about when you are considering appointing a laid off teacher to a part-time position.

9. Student Searches

JUAN C. v. CORTINES, 89 NY2d 659 (1997)

This is a case which is more significant for what it might have been than what the Court of Appeals finally decided. Juan C . was a student in the New York City schools who was searched by a teacher aide and found to have brought a gun to school. Two proceedings were initiated: a Section 3214 proceeding to suspend him pursuant to the Gun Free Schools Act and a Family Court juvenile delinquency proceeding.

In the Family Court proceeding the student alleged that the search by the aide that produced the gun was an illegal search and seizure, thus violating his Constitutional rights. The Family Court agreed and, in the absence of other evidence, dismissed the proceeding. Juan then turned around and argued that the dismissal of the Family Court proceeding was binding on the School District (collateral estoppel) and that it could not proceed with the suspension hearing.

The Appellate Division agreed, even though the Fourth Amendment provisions applied only to a criminal or quasi criminal proceeding and not to an administrative hearing conducted by a school district.

The Court of Appeals reversed. While the Court did not discuss the application of the rules of search and seizure in student discipline matters, it found a lack of identity of issues between the Family Court and the student discipline hearing. A decision in one was not binding on the other.

10. Vacating Arbitration Awards

MATTER OF MABSTOA v. TRANSIT WORKERS UNION, 227 AD2d 995 (1st Dept. 1996) and SACHEM CENTRAL TEACHERS ASS'N v. SACHEM CSD, 227 AD2d 632 (2d Dept. 1996)

These two cases speak to the importance of contract language in grievance procedures. In MABSTOA the collective bargaining contract provided that an employee's absence without notice for 20 days constituted a resignation. The grievant in this case was absent for more than 20 days because he was serving a jail sentence in connection with the death of his child. The arbitrator ordered him reinstated, finding that the contract language only applied to voluntary absences and that grievant's jail term could not be considered.

In Sachem the arbitrator considered (the dreaded) past practice to order a double increment to certain teachers.

In both cases the collective bargaining agreement contained a clause that the arbitrator had no power to add to, delete or amend the provisions of the agreement. In both of these cases the courts relied on that language to overturn to arbitrator's decision. This sort of language may be considered boilerplate. It is for that reason no less important. As in these cases it can impact the substantive outcome of a case. You should have similar language in your collective bargaining agreements.

CONCLUSION

Was the past year a good one—at least lawyer-wise? Probably, yes. It is continuing testament to our courts' and Legislature's ability to invent new rules, new procedures, new rights, all of which are designed (or at least have the effect) that attorneys will never be without work.

RECENT DEVELOPMENTS UNDER THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

By: Monte Klein

This outline covers Taylor Law developments during 1996 through May 1997. Legislative changes, major Board, court and miscellaneous decisions are reported. The full text of the statutory amendments and decisions should be examined as appropriate to the reader's circumstances.

LEGISLATION

School districts and BOCES are prohibited from diminishing retiree health insurance benefits unless a corresponding diminution is made from active employees. (June 30, 1994 - May 15, 1997) (1996 N.Y. Laws ch. 83). (Extender pending A.4217/S.2570).

New York City police and fire extended interest arbitration under PERB (1996 N.Y. Laws ch. 13 veto override) Held unconstitutional in City of New York v. PBA, 89 N.Y.2d 380, 29 PERB ¶7022 (Dec. 19, 1996)

Labor Law amended to prohibit use of state funds by employers to train managers, supervisors or administrators regarding methods to discourage union organization. (1996 N.Y. Laws ch. 453)

Nonattorneys permitted to represent parties at all PERB proceedings (1996 N.Y. Laws ch. 678)

BILLS

A.1604/S.814.	Makes financial ability to pay as defined primary factor in statutory interest arbitration. (Governor's program bill)
A.2170/S.1407	Arbitration for CSL §75 discharge proceeding
A.5913/S.3642	Injunctive relief extender
A.3125/S.390	Agency shop fee extender
A.5862/S.3274	Interest arbitration extender (1997 N.Y. Laws ch. 149)

BOARD DECISIONS

REPRESENTATION

Incorporated Village of Lake Success, 28 PERB ¶3073. Discussion of evidence necessary to establish recognition. On facts, no recognition found.

County of Oneida, 29 PERB ¶3001. Election objections dismissed. Replacement ballots to be sent only on request pursuant to information conveyed by voter during call-in procedure.

County of Erie and Sheriff of Erie County, 29 PERB ¶3031. Deputy sheriffs-criminal who are engaged exclusively or primarily in the prevention and detection of crime and the enforcement of the general criminal laws of the State fragmented from a Sheriff's department unit. (appeal pending) Accord County of Orleans and Sheriff, 29 PERB ¶3047.

Schenectady City School District, 29 PERB ¶3038. Development Officer, responsible for District's grant program, excluded from middle management unit as confidential. Clerk of the Works included as shared a sufficient community of interest.

County of Genesee, 29 PERB ¶3068. Head and supervising nurses were appropriately added to a unit of subordinate employees. Supervisory authority re staff direction and evaluation not considered significant and, therefore, minimal likelihood of conflict.

Town of New Hartford, 29 PERB ¶3076. Employer not permitted to contest unit placement on appeal having not objected to the placement during proceedings before Director despite claim Town's agents were not authorized to consent to placement.

IMPROPER PRACTICES

INTERFERENCE/DISCRIMINATION

Public Employees Federation, 29 PERB ¶3027. No DFR breach in union not taking action to hold employer to contractual limits for grievance processing.

County of Nassau, 29 PERB ¶3035. Employer and incumbent union did not violate Act by continuing negotiations regarding a memorandum of agreement after a decertification petition was filed by a challenging union because the petition did not raise a bona fide representation question. The MOA constituted a contract bar to the representation petition.

Genesee-Livingston-Steuben-Wyoming BOCES, 29 PERB ¶3065. Successor employer violated Act by changing the employment conditions it established for its employees during pendency of representation petition. (appeal pending)

Vernon Verona Sherill Teachers Association, 29 PERB ¶3074. Union's refusal to process objection which was properly filed violation even though union did not receive the objection. Fees not ordered forfeit. Union ordered to process objection immediately.

United University Professions (Yoonessi), 29 PERB ¶3075. Union's grievance settlement no violation even though was for a sum of money far less than that grievant claimed was owed. Union entitled to wide range of reasonableness in adjusting grievances. (appeal pending)

Village of Scotia, 29 PERB ¶3071. Police officer's comments in letter to employer's legislative body critical of Village's Chief of Police held concerted and protected. Village's demotion and suspension of employee for having made those comments violated Act. (appeal pending)

District Council 37 (DiMeo), 29 PERB ¶3078. No DFR breach in union expressing during grievance meeting an argument contrary to argument advanced by individual grievant.

IBT, Local 182 (Hoke), 30 PERB ¶3005. Union may disclaim representation status only by unequivocal declaration on advance notice to all interested parties.

City of Buffalo, 30 PERB ¶3021. Termination of employee caused by employer's admitted frustration with a union's proposal in negotiations City considered unacceptable held unlawful whether or not subject under negotiation is mandatory subject.

GOOD FAITH BARGAINING

County of Rockland, 29 PERB ¶3009. Deliberate misrepresentation of finances at fact-finding violated duty to bargain in good faith (Supreme Court ordered remand on remedy 29 PERB ¶7012).

Triborough Bridge and Tunnel Authority, 29 PERB ¶3012. Modified demand not new because it merely narrowed original demand. Negotiability properly measured retroactively to date demand was to apply, which was coincident with expiration of parties' last contract.

City of Buffalo, 29 PERB ¶3023. Practice of always appointing first person on civil service list is nonmandatory subject of negotiation. Accord Town of West Seneca, 29 PERB ¶3024. But agreement to appoint first person on list is not void as against public policy if appointment is subject to satisfactory completion of a probationary period. Professional, Clerical, Technical Employees Ass'n v. Buffalo Board of Education, ___ N.Y.2d ____, 30 PERB ¶____ (1997).

Town of Carmel, 29 PERB ¶3026, conf'd, 29 PERB ¶7016 (Sup. Ct. Alb. Co. 1996). Safety stipend demands arising from assignment of GML §207-c personnel mandatorily negotiable.

City of Rochester, 29 PERB ¶3070. City obligated to provide information regarding unit employees' job assignment on demand. The factual information demanded was not privileged and, therefore, it was not exempt from disclosure.

Town of Orchard Park, 29 PERB ¶3080. No obligation to incorporate interest arbitration award into collective agreement absent agreement to do so.

UNILATERAL CHANGE/DISCONTINUATION OF EXPIRED CONTRACT TERMS

Schuylerville Central School District, 29 PERB ¶3029. Salary increment sunsetted and, therefore, no duty to continue after expiration of contract.

Schalmont Central School District, 29 PERB ¶3036. Time off from work upon employer's approval of employee's request did not constitute practice entitling employee to time off upon demand.

Eastchester Union Free School District, 29 PERB ¶3041. Paid release time from work for religious practice held unconstitutional. District's rescission of practice no violation. Accord Auburn Enlarged City School District, 30 PERB ¶3033.

Greece Central School District, 29 PERB ¶3059, conf'd, 30 PERB ¶7002 (Sup. Ct. Alb. Co. 1996). District not obligated upon contract expiration to use cost-of-living formula to set new salary rates on new salary schedules.

County of Monroe, 29 PERB ¶3060. Unilateral allocation of titles to salary grade no violation. Allocation is not a mandatorily negotiable subject and was not improperly motivated. (appeal pending)

Hewlett-Woodmere Union Free School District v. PERB, ___ A.D. ___, 29 PERB ¶7019 (2d Dep't 1996). Refusal to bargain charge grounded upon unilateral change is not conditioned upon union's demand to negotiate.

City of Buffalo, 29 PERB ¶3077. Action by legislative body in enacting a local law banning smoking not reviewable under the refusal to bargain provisions of the Act. No executive branch adoption.

City of Buffalo, 30 PERB ¶3021. Assignment of unit personnel to fill unit vacancies nonmandatory even though change resulted in a loss of overtime opportunity to other unit employees.

County of Rockland/Sheriff, 30 PERB ¶3020. Change in personal leave practice no violation as contract gave Sheriff right to approve leave requests at his discretion.

State of New York (Tax and Finance), 30 PERB ¶3028. Dress code for office staff mandatorily negotiable.

New York City Transit Authority & MABSTOA, 30 PERB ¶3030. Standards for disqualification of bus drivers greater than those fixed by VTL mandatorily negotiable and not exempted from negotiation by VTL.

Town of Cortlandt, 30 PERB ¶3031. GML §207-c procedures and policies requiring termination from employment after one year of receipt of GML §207-c benefits mandatorily negotiable.

SUBCONTRACTING/TRANSFER OF UNIT WORK

Hewlett-Woodmere Union Free School District, ___ A.D.2d ___, 29 PERB ¶7019 (2d Dep't 1996). Transfer of unit work by abolition of unit position and creation of nonunit position violated the Act because there was no substantial difference in the duties actually performed by the incumbents.

County of Suffolk & Sheriff, 29 PERB ¶3002. Charge dismissed because charging party union did not have exclusivity over care and custody of detainees at County facility. (appeal pending)

State of New York (DOCS) v. PERB, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996). Civilianization of security services improper. Court adopts Niagara Frontier Transportation Authority (18 PERB ¶3083) analysis.

Odessa-Montour CSD v. PERB, 228 A.D.2d 892, 29 PERB ¶7009 (3d Dep't 1996). Subcontracting of bus service did not violate the Act. Charge as filed and proven established only legislative action which could not violate District's duty to bargain.

CSEA v. County of Westchester, 219 A.D.2d 651 (2d Dep't 1995). Subcontract held not subterfuge concealing employer-employee relationship.

County of Onondaga/Sheriff, 29 PERB ¶3046. Transfer of fleet manager duties no violation. Transfer permitted under management rights clause which remained applicable despite voluntary fragmentation of unit in existence when management right obtained.

Town of Lloyd, 29 PERB ¶3040. Transfer of police investigation of serious accidents to State Police no violation. No exclusivity.

Town of East Hampton, 29 PERB ¶3043. Transfer of certain police functions no violation. No exclusivity.

County of Erie, 29 PERB ¶3044. Transfer of cable pulling no violation. No exclusivity.

Vestal Central School District, 30 PERB ¶3029. Subcontract of printing services to BOCES nonmandatory as Educational Law Add to §1950(4)(d) established legislative intent to exempt decision from mandatory negotiation under Webster CSD, 75 N.Y.2d 619.

Fairview Fire District, 29 PERB ¶3042. Civilianization of fire dispatch no violation. Balancing of interests favored nonmandatory negotiability determination. Accord City of Newburgh, 29 PERB ¶3039.

County of Erie, 29 PERB ¶3045. Subcontracting of medical services for County Home residents no violation. Balancing of interests favored nonmandatory negotiability determination.

Union-Endicott Central School District, 29 PERB ¶3056. Subcontracting of ballast and lamp replacement in existing fluorescent fixtures violated Act. Prior use of contractors on electrical projects did not breach exclusivity. Volume of work held not a basis for establishing or disestablishing exclusivity. (appeal pending)

Clinton Community College, 29 PERB ¶3066. Duties of coordinator of College Entry Program (CEP) improperly transferred. Discernible boundary existed as to CEP, it being separate and distinct program.

New York City Transit Authority, 30 PERB ¶3004. Routine bus maintenance and repair improperly transferred. Right to "farm out" work did not evidence waiver of right to negotiate transfer of work to other of employer's employees. (appeal pending)

County of Erie, 30 PERB ¶3017. Supervisory duties improperly transferred. Duties actually performed by nonunit employees, not duties which could have been performed, material. No compelling need defense as no prior bargaining.

Buffalo Sewer Authority, 30 PERB ¶3018. Shift superintendent's work improperly transferred to nonunit wastewater operator II.

JURISDICTION

State of New York (EnCon), 29 PERB ¶3057. Remand on jurisdictional issue and jurisdictional deferral ordered. Record before ALJ raised substantial jurisdictional issues which ALJ had to resolve before reaching merits.

Hammondsport Central School District, 29 PERB ¶3063. Contract interpretation not prohibited when necessary to disposition of improper practice charge on merits.

City of Newburgh, 30 PERB ¶3027. Breach of contract clause which merely incorporates rights under the Act within PERB's jurisdiction.

PRACTICE AND PROCEDURES

Odessa-Montour Central School District, ___ A.D.2d ___, 29 PERB ¶7009 (3d Dep't 1996). PERB is "court of original jurisdiction" to which Education Law §3813 claim must be raised.

Marlboro Faculty Association, 29 PERB ¶3007. Charge pleaded in conclusory fashion dismissed.

City of Troy, 29 PERB ¶3004. Make-whole order held not punitive despite City's financial condition.

Beckerman v. Comsewogue Union Free School District, ___ A.D.2d ___, 29 PERB ¶____ (2d Dep't 1996). Permission to file late Education Law §3813 notice of claim should be granted by court absent District's demonstration of prejudice if District is on notice of a timely-filed improper practice charge.

Union-Endicott CSD v. PERB, 168 Misc.2d 284, 29 PERB ¶7004 (Sup. Ct. Alb. County) (March 1996). Participation at PERB hearing is the practice of law. Over objection, PERB may not proceed to hearing if a party is represented by a nonattorney, revd, ___ A.D.2d ___, 29 PERB ¶7020 (3d Dep't 1996) Judiciary Law §478 not applicable because PERB is not a court of record. (1996 N.Y. Laws ch. 678 restores right of nonattorney representation).

Sidney Central School District, 29 PERB ¶3021. Timeliness of charge and satisfaction of notice of claim requirements are separate issues.

Town of Shawangunk, 29 PERB ¶3050. Motion to appeal ruling reopening closed case denied.

Chenango Forks Central School District, 29 PERB ¶3058. Charge properly reopened on consent. Second notice of claim not required as a condition to reopening. Objection to nonattorney representation not raised at hearing denied. Recusal motion denied as not promptly made and on merits as record did not establish bias or impermissible advocacy.

Town of Carmel, 29 PERB ¶3073. Charge raising potential contract violation deferred both on jurisdiction and merits to uninvoked grievance procedure.

New York Convention Center Operating Corporation v. PERB, 29 PERB ¶7023 (Sup. Ct. N.Y. Co. 1996). Service on party's attorney starts thirty-day period for appeal of PERB decision and order. Court leaves open question as to whether service is effective upon mailing or receipt as appeal untimely even from latter.

Fulton Firefighters Ass'n, 29 PERB ¶6501. Declaratory ruling petition objecting to proposals in interest arbitration must be timely filed pursuant to §205.6 of the Rules.

New York City Transit Authority, 30 PERB ¶3007. Motion to strike parts of exceptions and brief denied. Issues could be reviewed on receipt of response to exceptions.

County of Erie, 30 PERB ¶3017. Make-whole order appropriate even though no proof of actual damages.

State of New York (SUNY Health Science Center), 30 PERB ¶3019. Unilateral change and discontinuation of expired contract term allegations deferred on merits to pending grievances. Bad faith bargaining conduct not deferred. Lengthy discussion of jurisdictional and merits deferral policies.

City of Newburgh, 30 PERB ¶3027. Access to PERB not waived by contract clause subjecting certain claims to court review only. Waiver of right to file charge must be explicit and clear.

Matter of Halley, 30 PERB ¶3023. Attorney representative held to have engaged in misconduct by pattern of conduct establishing bad faith intent to delay processing of petitions for decertification.

RULE CHANGES

Rule changes, affecting primarily representation proceedings, effective February 28, 1996 and March 15, 1996.

MISCELLANEOUS

Board of Education of Buffalo City School District v. Buffalo Teachers Federation, Index No. 10728/93 (Sup. Ct. Erie Co. 1994), aff'd, 217 A.D.2d 366, (4th Dep't 1995). Waiver of ratification and order to execute contract does not waive or eliminate separate requirement of legislative approval. Supreme Court finds that approval was required as to "compensation" or "compensation-related" provisions of the contract, but also suggests that legislative approval extends to contract provisions that fall within a board of education's delegated authority under the Education Law. Appellate Division restricted review to "compensation provisions", rev'd, 89 N.Y.2d 370 (Dec. 19, 1996), 29 PERB ¶7506. Board of Education's resolution directing superintendent to execute contract constitutes legislative approval of the contract and makes the contract binding.

Middle Country Administrators Association v. Middle Country Central School District, 28 PERB ¶7504 (Sup. Ct. Suffolk County), aff'd, 226 A.D.2d 124, 29 PERB ¶7502 (1st Dep't 1996). A duly elected board of education has the statutory authority, even during its lame duck period, to approve a multi-year collective bargaining agreement, provided the terms of the agreement are fair and reasonable.

City of Utica v. Zumpano, (Sup. Ct. Oneida Co. 1996). Continuation of minimum staffing clause in expired collective bargaining agreement void as against public policy when applied to municipality in financial crisis. (appeal pending)

Children's Village v. Greenburgh Eleven Teachers Union, (2d Dep't 1996). Order compelling union officers and members to answer deposition questions proper. Court did not have to defer jurisdiction to PERB because agency expertise was not required. Questioning would not interfere with union's or members' right to organize and consult.

Nassau Community College Federation of Teachers, 30 PERB ¶3003. County mini-PERB without jurisdiction over employees of community college because those employees are not employed by the County but by the County/College as a joint employer.

Niagara Frontier Transportation Authority, 30 PERB ¶3009. Aircraft rescue fire fighters employed by a public authority not eligible for interest arbitration. Not members of an organized fire department and not covered by 1988 "Syracuse Hancock" amendment. Amendment applicable to covered municipality which replaces fire fighters with others to deliver same services.

State of New York (GOER), 30 PERB ¶3013. Interpretation of §209.4(e) pertaining to scope of compulsory interest arbitration for State Police. (appeal pending)

Cayuga-Onondaga BOCES v. Sweeney, 89 N.Y.2d 395 (1996). Education Law §3813 notice of claim requirements not applicable to prevailing wage claims brought by Commissioner of Labor which vindicated a public interest.

STUDENT SEARCHES AND SEIZURES

By Beth A. Bourassa[1]

Under both the New York State Constitution and the Fourth Amendment of the United States Constitution, individuals have a right to be free from unreasonable searches and seizures. While students do not shed these and other constitutional rights at the schoolhouse door, neither do they enjoy the full measure of constitutional protection afforded to adults. The federal and state courts have long recognized that although the constitutional prohibitions on unreasonable searches and seizures apply to school officials, the educational setting is unique and requires greater flexibility in balancing a student's legitimate expectation of privacy against the school district's substantial interest in maintaining discipline and order in the classroom and on school grounds.

At bottom, any search or seizure of a student by a school official in a school setting must be reasonable under all the circumstances. The courts will use a sliding scale to determine the reasonableness of a search or a seizure depending upon the circumstances of each case. The following general rules can be gleaned from a substantial body of federal and New York State case law.

---

[1] Ms. Bourassa is associated with the law firm of Whiteman Osterman & Hanna in Albany, New York. Ms. Barbara Kruzansky, a summer associate at Whiteman Osterman & Hanna, assisted with the legal research for these remarks and the attached Table of Cases.

SEARCHES OF STUDENTS' PERSONS AND BELONGINGS

Since at least 1985, when the United States Supreme Court decided the landmark case of New Jersey v. TLO, it has been clearly established that a search of a student's person or his or her belongings such as a wallet, a purse or a backpack, requires individualized reasonable suspicion of wrongdoing. Specifically, a search of a student's person or belongings must be:

1. Justified at the inception. There must be reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or rules of the school; and

2. Permissible in scope. The search must not be excessively intrusive in light of the age and sex of the student and the nature of the infraction.

The New York State Court of Appeals, this State's highest court, has held that the reasonable suspicion standard established in TLO for Fourth Amendment purposes under the United States Constitution is also appropriate for a search of students' persons and their belongings under Article I, §12 of the New York State

Constitution, which also guarantees the right to be free from unreasonable searches and seizures.

A review of the facts in TLO demonstrates how the reasonable suspicion standard is applied by the courts. In that case, a student was discovered by a teacher to be smoking a cigarette in the girls' room. When the student was brought to the principal's office, she denied that she had been smoking. The principal then searched the student's purse, which revealed not only cigarettes, but also some rolling papers which are commonly used for marijuana. After the principal found the rolling papers, he unzipped a separate compartment of the student's purse which revealed marijuana, a substantial sum of cash, other drug paraphernalia, and written records indicating that the student was dealing drugs.

The United States Supreme Court concluded that the search of the student's purse was in all respects reasonable. The teacher's report that the student had been smoking in the girls' room gave rise to reasonable suspicion that a search would turn up cigarettes, which were a violation of the rules of the school. The rolling papers that were found during that initial search of the purse then gave rise to reasonable suspicion that a further search of the purse would turn up marijuana, and thus justified the search of the separate zippered compartment of the student's purse.

The facts of every case will, of course, be different, and the courts will examine the specific circumstances of each case to determine whether a particular search was reasonable. In general, however, information from a reliable source will give rise to reasonable suspicion justifying a search of a student's person or belongings. This may include information from a staff member or a student. A student's reliability will be considered greater if the student will be subject to disciplinary action for knowingly providing false information. On the other hand, an anonymous tip from a source whose identity is not revealed generally will not give rise to reasonable suspicion.

Observations of teachers, administrators, or other staff members may also give rise to reasonable suspicion. There must, however, be reasonable suspicion not only that the student has engaged or is engaging in some violation of the law or of the rules of the school, but also that conducting the search will turn up evidence of that violation.

The attached Table of Cases includes a description of a number of cases involving searches of students' persons and belongings. Those cases shed some further light on what is and is not considered reasonable under all the circumstances.

11/speeches/student.doc

STRIP SEARCHES

Any search in which a student is required to remove some or all of his or her clothing (other than an outer jacket), is obviously far more invasive and potentially traumatic for the child. As one court observed, "it does not require a constitutional scholar to conclude that a nude search of a 13 year-old child is an invasion of constitutional rights of some magnitude."

The standard for such a search is still individualized reasonable suspicion. It is important, however, to remember the second prong of the test developed by the Supreme Court in TLO. In addition to being justified by reasonable suspicion, a search must also not be excessively intrusive in light of the age and sex of the student and the nature of the infraction. Remember also that the courts will also use a type of sliding scale to balance the rights of the student against the legitimate interests of the school district. When a student is asked to remove some or all of his clothing, the degree of intrusion on the student's privacy interests increases substantially. For the search to be considered reasonable under these circumstances, the government interest in conducting the search must be correspondingly great.

In general, any time a student is asked to remove some or all of his or her clothing, the search should be conducted in a private room by two staff members of the same sex as the student. Such a search should only be conducted if there is reasonable suspicion to believe that the student is concealing a weapon or illegal drugs, or something of an equally serious nature. Because of the highly intrusive nature of the search, a strip search would not be justified by a relatively minor infraction such as possession of cigarettes.

There have been a number of federal court cases both in New York and in other jurisdictions arising out of strip searches of students believed to have stolen a small sum of money. With the notable exception of a recent federal court case in Alabama, virtually all of the courts have held that such searches were unconstitutional.

LOCKERS

A search of student lockers is generally permissible even without individualized reasonable suspicion. Unlike a student's person or belongings, a student will generally have no legitimate expectation of privacy in his or her locker. Lockers are usually considered to be the property of the school, rather than the student. The building principal or other administrator may be in possession of a master key to all of the lockers, or may be in possession of the combinations to each locker. The principal or other administrator will generally be authorized to conduct a locker search, or to consent to a locker search by the police, even in the absence of any individualized reasonable suspicion of wrongdoing by a particular student.

The same rule would likely apply to students' desks. To be on the safe side, school districts should include in their student handbooks a provision which states that lockers and desks remain the exclusive property of the school, and that students have no expectation of privacy with respect to these areas.

Assuming that a school district has not given students truly exclusive control over their lockers, either a blanket search of all student lockers, or a random search of selected student lockers, may be conducted. If a random search is conducted, it is important that the search be truly random. For example, every fifth locker could be searched. If lockers assigned to particular students are singled out for a search, however, there must be individualized reasonable suspicion that those particular students have engaged in wrongdoing. Such a search would not be considered a random search.

By itself, a random or blanket search of lockers is probably of little use. Unless the student's locker reveals contraband in plain view, a further search of the contents of the locker -- such as the student's coat pockets, or the contents of a book bag in the locker -- could not be made.

CANINE SEARCHES

A more practical approach to random or blanket searches of student lockers involves the use of drug sniffing dogs who are specially trained to detect the presence of drugs. These searches are generally carried out by police officers and their dogs, who are assigned to canine search units. Although a search conducted in the school setting by a police officer normally requires probable cause, that is not the case with respect to canine searches.

Because a student has no legitimate expectation of privacy in his or her locker, a canine search of students' lockers does not require even reasonable suspicion of wrongdoing. If the drug sniffing dog alerts on a particular student's locker, the dog's alert then justifies a further search of the contents of the locker, including the student's coat pockets or book bag.

The courts in this state have not yet ruled on the propriety under the New York State Constitution of canine searches of student automobiles. In other contexts, the United States Supreme Court and the New York State Court of Appeals have ruled that a canine search of luggage at airports, and even of a person's residence, does not constitute a search under the Fourth Amendment of the United States Constitution. It seems clear, accordingly, that a canine search of student automobiles would not constitute a search under the United States Constitution.

The New York State Court of Appeals, however, has generally interpreted the comparable search and seizure prohibitions under Article I, §12 of the New York State Constitution to provide broader protection to individuals to be free from government intrusion. The Court has held, for example, that a canine search of a residence is a search within the meaning of the State Constitution. Even though such a search is conducted by police, a warrant and probable cause are not required for the search under the State Constitution. Instead, only individualized reasonable suspicion is required, because a canine search is much less intrusive than a physical entry and search of the house.

It is at least theoretically possible that if presented with the question, this State's highest court could rule that a canine search of student automobiles similarly may not be conducted in the absence of individualized reasonable suspicion. On the other hand, it is by no means clear that the court would do so. As noted above, students' rights in the school setting are more constrained than those of an adult. It is more likely, therefore, that the Court of Appeals would hold that reasonable suspicion is not required for a canine search of a student's automobile on school grounds. At least one federal court in another jurisdiction has already reached this conclusion.

As is the case with lockers, a canine search of student automobiles should be either a blanket search of all automobiles, or a search of a randomly selected number of automobiles. Individual students' cars should not be targeted for a canine search in the absence of individualized reasonable suspicion of wrongdoing by those students.

Many school districts in this area have conducted canine searches of automobiles, without constitutional challenge. To minimize the chances of a successful constitutional challenge, a district should, if possible, enlist the support of students and parents for such a search. Students and their parents should also be advised, via a newsletter or otherwise, of the upcoming search.

Obviously, however, the exact date of the search should not be disclosed.

A random or blanket canine search of students' persons should not be conducted. This is a more intrusive and potentially frightening invasion of students' privacy, and should not be undertaken in the absence of individualized reasonable suspicion that a particular student is in possession of drugs.

METAL DETECTORS

The use of metal detectors in schools has been upheld, even when the metal detectors are set up and manned by police officers. A scan of a student's person and belongings by a metal detector constitutes a search within the meaning of the Federal and State Constitutions. The search, however, is so minimally intrusive that it does not require probable cause and a warrant, or even individualized reasonable suspicion. A suspicionless blanket or random search of students and their belongings by a metal detector device is thus constitutionally permissible.

DRUG TESTING

The United States Supreme Court has upheld the constitutionality of urinalysis drug testing of student athletes. Although the collection and testing of a urine specimen constitutes a search under the Fourth Amendment, individualized reasonable suspicion is not required, at least with respect to student athletes.

In Vernonia School District v. Acton, the school district's policy required blanket testing of all athletes at the beginning of each sports season. Thereafter, 10% of the athletes were randomly selected for additional testing during the season. The Court found that suspicionless drug testing of the student athletes was justified because:

- the school district had concluded that a significant number of athletes were using drugs;
- drug use increases the risk of sports-related injury;
- student athletes have a diminished expectation of privacy (the court noted, for example, that school locker rooms "are not for the bashful"); and
- the "role model effect" of athletes' drug use is effectively addressed by making sure that student athletes do not use drugs.

Because the urinalysis search was of a "minimally intrusive" nature, the students' privacy rights were outweighed by the strong government interest in deterring drug use by athletes.

Under §912(a) of the New York State Education Law, the written consent of a student's parent(s) must be obtained prior to requiring a student to undergo urinalysis for drug detection. Such parental consent may be required, however, as a condition for participation in interscholastic sports.

Some of the language of the Supreme Court's opinion in Vernonia suggests that the Court might be willing to uphold urinalysis drug testing for the entire student body, rather than just athletes. It is by no means clear, however, that that would be the case. Moreover, as a practical matter, drug testing of the entire student body is probably not warranted or feasible. Such a practice would likely be prohibitively expensive and, in light of the parental consent requirement, unworkable.

SEIZURES

As is the case with searches, the school environment presents a unique backdrop for the operation of federal and state constitutional principles regarding seizures. The preservation of order and a proper educational environment requires close supervision of students and justifies some seizures that would not be constitutionally permissible for an adult.

In essence, students are constrained or "seized" from the moment they enter school. Compulsory education laws require students' attendance at school. Moreover, students are not free to roam the halls or to do as they please in any classroom of their choice. Their location and movements within the school are largely dictated by school officials throughout the school day.

Nevertheless, the federal and state constitutional right to be free from unreasonable seizures extends to seizures by or at the direction of school officials. Generally, constitutional issues involving seizures of students arise in one of two categories: 1) seizures in connection with child protective services; and 2) seizures for disciplinary reasons. Whether a seizure is reasonable, and thus constitutionally permissible, depends upon whether the seizure is:

1. justified at it inception; and
2. reasonable in scope and duration in light of all the circumstances.

CHILD PROTECTIVE SERVICES

Under state law, teachers, administrators and certain other school personnel are required to make a report respecting any suspected incident of child abuse or neglect. The courts have concluded that because teachers and administrators are mandated reporters, it is entirely reasonable for them to question students regarding possible abuse or neglect. The courts have uniformly rejected constitutional challenges brought by parents who claim that their children were unconstitutionally seized by school personnel when they were either detained or removed from a classroom for questioning regarding possible abuse or neglect.

Constitutional challenges have also failed when students have been removed from school and taken into protective custody by Department of Social Services ("DSS") personnel. The courts have concluded that the removal of a child from school for protective services by DSS personnel requires probable cause, and either a warrant or emergency circumstances. Even assuming, however, that DSS personnel overstep their bounds and effect an unconstitutional removal of a child, school district personnel cannot be liable for that action. School district personnel have no authority to prevent a child's removal from school by DSS, and have no choice but to permit DSS to carry out its responsibilities. For this reason, even if a seizure is found to be unconstitutional as against DSS, a school district and its personnel will not be liable.

DISCIPLINARY SEIZURES

Disciplinary seizures arise when a child is removed from a classroom by a teacher and escorted to some other location, as well as when a student is placed in time-out, or otherwise isolated from a group of other students for disciplinary reasons. If nothing else, cases arising out of disciplinary seizures of students demonstrate the extent to which some parents will literally make a federal case out of something as seemingly trivial as a brief time-out period.

Because of the need to maintain order and discipline in the schools, a disciplinary seizure of a student need only be objectively reasonable under the circumstances. Relevant circumstances include the age and any handicapping condition of the child, as well as the nature and severity of the child's infraction. In the vast majority of cases, these types of seizures have been found to be reasonable by the courts.

In at least one federal court case in another jurisdiction, however, the court held that school district personnel could be found liable for placing a student in time-out. In that case, an eighth-grade emotionally disturbed student in a special education class was placed in a locked time-out room for approximately 10 minutes as a result of disruptive behavior. The court denied the defendants' motion for summary judgment, and refused to dismiss the parents' Fourth Amendment claim. The court did not rule that the defendants were in fact liable, but only that they could be found liable at trial, on the theory that the seizure was unreasonable in light of the child's age and emotional disability.

EXCLUSIONARY RULE

If a search or seizure is found to be unreasonable, any evidence obtained as a result of that search or seizure will be suppressed in any related criminal case. In criminal cases (as well as in family court proceedings involving juvenile offenders), evidence obtained as a result of an illegal search or seizure is considered the "fruit of the poisonous tree" and cannot be used to establish guilt of the conduct charged.

Does the exclusionary rule also apply in a student disciplinary proceeding? Courts in other jurisdictions have concluded that the answer is no. In this state, the courts have not yet squarely addressed this issue.

Recently, in a case called Matter of Juan C., the Court of Appeals chose not to address the issue of whether the exclusionary rule applies in school disciplinary proceedings. Instead, the court decided only that a school district was not bound by a prior family court decision regarding the reasonableness of a search.

In that case, a security aide at a Bronx high school had observed what he suspected to be a gun pulling down one side of a student's jacket. The security aide grabbed at the student, chased him down the hall, and then removed a gun from his jacket.

For reasons which are not clear from the court's opinion, a Bronx County family court proceeding arising out of criminal charges against the student took place before any student disciplinary hearing was held. The court concluded that the search was unreasonable and suppressed the gun in the juvenile delinquency proceeding. After that proceeding was concluded, the school district instituted a student disciplinary proceeding. The district superintendent concluded that the search was reasonable, and refused to suppress the gun. The student was suspended from school for one year.

On behalf of the student, the New York Civil Liberties Union then lead a charge all the way to the Court of Appeals, contending that the school district was required to suppress the gun, as the family court had previously done. As noted above, the Court of Appeals concluded that the school district was not bound by the family court's determination and could independently determine that the search had been a reasonable one. The court did not address the issue of whether, assuming that the search could not possibly have been found to be reasonable, the exclusionary rule would apply in the student disciplinary proceeding.

As a practical matter, in most cases, a student disciplinary hearing (which must be held within five days after a student is suspended) will precede any determination in a related criminal or family court proceeding. Under Juan C., however, even if a court has already decided that evidence obtained from a student must be suppressed in another forum, a school district is not necessarily bound by such determination.

Unless and until the courts in this State hold to the contrary, school districts may reasonably take the position that the exclusionary rule does not apply in student disciplinary proceedings. The exclusionary rule may prevent the disciplining of students who endanger others, and may thus frustrate the school's critical mission of educating and protecting children. Moreover, school officials are not law enforcement officers and do not have an adversarial relationship to students. Instead, they have a personal responsibility for students' education and welfare. There is thus little need for the deterrent effect of the exclusionary rule. Finally, excluding evidence in a student disciplinary proceeding will not necessarily shield a school district and individual administrators or other personnel from civil liability for a violation of the student's constitutional rights.

In sum, the need to ensure order and safety in the schools requires a flexible application of search and seizure principles in the school setting. The central guiding rule is one of reason. So long as a search or seizure of a student is reasonable under all the circumstances, it is constitutionally permissible.

11/speeches/students.doc

STUDENT SEARCHES AND SEIZURES

TABLE OF CASES

SEARCHES

Students' Persons and Belongings

1. New Jersey v. TLO, 469 U.S. 325, 105 S. Ct. 733 (1985).

   See discussion on pages 2-3.

2. Matter of Gregory M., 82 N.Y.2d 588 (1993).

   A student at a Bronx high school tossed his book bag near a security officer, who heard a metallic thud. The security officer then ran his hand over the outside of the bag and felt the outline of a gun. He then opened the bag to reveal the gun. The court concluded that the search was reasonable. The "thud" alone would not have given reasonable suspicion to open the bag in the first instance, but did justify the "minimally intrusive" touching of the outer surface of the bag. When the officer felt the outline of a gun in the bag, this gave rise to reasonable suspicion to justify opening the bag.

3. People v. Scott D., 34 N.Y.2d 483 (1974).

   A search of a student's wallet and clothing revealed illegal drugs (a white powder and pills). The court held that the search was not justified by: 1) a teacher observing the student enter the boys' room with another student and then exit quickly, twice within an hour; and 2) a tip from an anonymous confidential source. These factors did not give rise to reasonable suspicion that the student was dealing drugs.

4. Matter of Trevor C., 227 A.D.2d 282 (1st Dep't 1996).

   In this case, the court concluded that school officials conducted a proper search of a student's book bag, based on reasonable suspicion that the student had improperly acquired a full-fair bus pass, instead of the half-fair bus pass to which he was entitled. A full-fair bus pass was missing, and the student could not explain his inability to produce his half-fair pass.

5. Matter of Ronnie H., 198 A.D.2d 415 (2d Dep't 1993).

A student was suspected of wearing a stolen jacket. He was asked to leave the jacket in the principal's office. The student then asked that the contents of the jacket pocket be returned to him. When the principal complied with this request, he found crack cocaine in a pocket. The court held that this was not a search at all. The principal was merely complying with the student's request for the return of his property. Even assuming that it was a search, however, the court concluded that the principal's actions were reasonable.

6. Matter of Kevin P., 186 A.D.2d 199 (2d Dep't 1992).

A security officer in a Brooklyn high school saw defendant in an area that was off limits. The security officer asked the defendant for a student identification card and the defendant was unable to produce one. The security officer made accidental contact with the defendant's waistband and felt what he believed to be a gun. The court held that the subsequent frisk of the defendant, which revealed a gun, was justified.

7. Matter of Ronald B., 61 A.D.2d 204 (2d Dep't 1978).

One school official advised another that a student was carrying a gun. The court held that the subsequent frisk of the student and search of the student's pocket, which revealed a gun, was justified by the information from a reliable informant.

8. C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996).

A student informant advised the principal that another student was going to make a drug sale later that day. A search of that student's pockets revealed a marijuana look-a-like substance, which was prohibited by the student disciplinary code. The court held that the tip from the student informant established reasonable suspicion for the search. The tip was not anonymous, and giving false information would have lead to disciplinary action against the student informant, making the tip reliable.

9. Cason v. Cook, 810 F.2d 188 (8th Cir.), cert. denied, 482 U.S. 930, 107 S. Ct. 3217 (1987).

A search of a student's purse was justified by reports of missing property, as well as reports that the student was seen, at an unscheduled time and without permission, in the locker room from which the items were stolen. After a search of her purse turned up one of the missing items, a pat-down search of the student's person was justified.

Strip Searches

1. M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979).

The court concluded that a strip search of a high school student was a highly intrusive invasion of her privacy which was not justified by the mere suspicion that the student might have stolen some unidentified object.

2. Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).

An entire fifth grade class was required to strip to their underwear in connection with a search for $3 that was missing. The girls disrobed in the girls' bathroom in front of a female faculty member and the boys disrobed in the boys' bathroom in front of a male faculty member. The search did not turn up the missing money. The court held that the search was unconstitutional and violated the students' Fourth Amendment rights. There was no reasonable suspicion to believe that each student who was searched had stolen the money, and the search was excessively intrusive in light of the nature of the alleged infraction.

3. Jenkins v. Talladega City Board of Educ., ___ F.3d ___, 1997 U.S. App. Lexis 12658 (11th Cir. June 2, 1997).

In a case that arose in Alabama, two second grade girls were strip searched, including removing their underwear, in a quest to turn up $7 that was missing. The search did not reveal the missing money. The issue before the court was whether the individual defendants who conducted the search were entitled to qualified immunity from liability in a federal civil rights action.

The court did not decide whether the strip search violated the girls' Fourth Amendment rights. Instead, the court held that the law in this regard was not clearly established and that the individual defendants were thus entitled to qualified immunity. The court concluded that no reasonable school official could know whether such a search was unreasonable, in the absence or prior federal or Alabama State case law involving similar facts.

4. Cornfield v. Consolidated High School Dist., 991 F.2d 1316 (7th Cir. 1993).

   A 16-year-old student in an alternative program due to a behavior disorder was required to remove all of his clothing in the boys locker room in front of two male faculty members, based upon reasonable suspicion that he was "crotching" drugs. The court concluded that the search was reasonable. Reasonable suspicion was established by a number of independent factors. Specifically: 1) the student had admitted prior drug use and a prior positive drug test to a teacher; 2) a bus driver had advised the principal that he observed the odor of marijuana emanating from the student; 3) another student informant had advised that the student was in possession of drugs; and 4) a teacher observed an unusual bulge in the student's crotch area.

5. Williams v. Allington, 936 F.2d 881 (6th Cir. 1991).

   A strip search of a female high school student in the presence of a female secretary to search for drugs was reasonable. The strip search was based on a tip from a student informant and other factors indicating drug use by the student.

6. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022, 101 S. Ct. 3015 (1981).

   Students were subjected to a canine search of their persons, followed by a strip search of any student upon whom the dog alerted. The court held that the strip search was not justified and that it violated not only the students' constitutional rights, but also "common human decency."

7. Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992), aff'd, 12 F.3d 215 (6th Cir. 1993).

   A male high school student was required to remove his shirt and jeans, but not his underwear, in front of two male security guards. The court held that the search was justified by reasonable suspicion that the student possessed drugs. Several faculty members had detected the odor of marijuana emanating from the student. The student also appeared to be lethargic and had dilated pupils.

8. Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995).

A number of seventh grade girls were required to remove their clothing, including their bras, in the girls locker room in the presence of two female gym teachers. The purpose of the search was to locate $4.50 that was missing. The court held that the search was unreasonable. The individual defendants were held liable for violation of the students' clearly established constitutional rights.

Lockers

1. People v. Overton, 24 N.Y.2d 522 (1969).

In this case, the locker search was conducted by the police, rather than by school officials. The issue before the court was whether a warrant was needed, in addition to probable cause. The court concluded that a warrant was not needed and that the school principal could "consent" to the search of student lockers by the police. The school district board and its administrators "retained dominion over the lockers." The principal had a master key to all lockers, and school regulations gave students' exclusive control over their own locker only vis-a-vis other students.

2. Singleton v. Board of Educ. U.S.D. 500, 894 F. Supp. 386 (D. Kan. 1995).

A search of student lockers made under the auspices of a previously promulgated school locker search policy was upheld. The school policy stated that a student's possession of his or her locker was not exclusive as against the school.

Canine Searches

1. U.S. v. Place, 462 U.S. 696, 103 S. Ct. 2637 (1983); People v. Price, 54 N.Y.2d 577 (1981).

Canine sniff of luggage at an airport is not a search under the Fourth Amendment of the United States Constitution.

2. People v. Dunn, 77 N.Y.2d 19 (1990).

   A canine sniff of a residence is not a search under the Fourth Amendment of the United States Constitution, but is a search under Article I, §12 of the New York State Constitution. The police do not need a warrant and probable cause for the canine search. Only reasonable suspicion is required because a canine search of a house is much less intrusive than physical entry and search of a house.

3. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1981), cert. denied, 463 U.S. 1207, 103 S. Ct. 3536 (1983).

   Canine sniffing of students' cars and lockers does not constitute a search under the Fourth Amendment. Canine sniffing of a student's person is a search under the Fourth Amendment and requires individualized reasonable suspicion of wrongdoing.

Metal Detectors

1. People v. Dukes, 151 Misc. 2d 295 (1992).

   Metal detectors in certain New York City schools were set up and manned by police officers. A metal detector device was activated by a student's book bag. A subsequent search of the book bag revealed a knife. The court held that the scan by the metal detector was a search, but was so minimally intrusive that it did not require probable cause and a warrant. Even though the search was conducted by police, the metal detector search also did not require individualized reasonable suspicion of wrong-doing.

Drug Testing

1. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995).

   See discussion on pages 12-13.

SEIZURES

Disciplinary Action

1. Hassan v. Lubbock Indep. School Dist., 55 F.3d 1075 (5th Cir.), cert. denied, 116 S. Ct. 532 (1995).

A group of sixth graders were touring a juvenile detention facility. A student who misbehaved was removed from the group and placed in a cell-type holding room where he was supervised by facility employees until the group completed its tour. The court held that there was no Fourth Amendment violation. The seizure was reasonably justified at its inception by the need to discipline a misbehaving student without disrupting the tour. The seizure was reasonable in scope because of the need to isolate the student from the juvenile inmates at the facility and the need to provide supervision for the student. The seizure was reasonable in duration because the student was released as soon as the group completed its tour.

2. Wallace v. Battavia School Dist. 101, 68 F.3d 1010 (7th Cir. 1995).

   A student was screaming obscenities and invitations to fight in the classroom. A teacher took her by the arm and escorted her out of the classroom. On this basis, her parents brought a federal court action alleging a violation of her Fourth Amendment rights. The court held that there was no such violation. The teacher's actions were a reasonable response to the student's outburst and the need to restore order in the classroom.

3. Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989).

   A vice principal removed a high school student from his class and interrogated him for 20 minutes in a closed office regarding a bomb threat that had been received earlier that day. The court concluded that this was a seizure, but that the seizure was a reasonable one. The seizure was justified at its inception by statements from two other students, who implicated that student as the person who called in the bomb threat. Given the seriousness of the offense, the seizure was reasonably related in scope to the need to determine whether the student had indeed committed the offense.

4. Rasmus v. State of Arizona, 939 F. Supp 709 (D. Ariz. 1996).

   An eighth grade emotionally disturbed student in a special education class was placed in a locked time-out room for approximately 10 minutes as a result of disruptive behavior. The court denied the school district's and the school employees' motion for summary judgment, and refused to dismiss the student's Fourth Amendment claim. The court did not hold that the defendants were liable, but only that they could be found liable at trial, on the theory that the seizure was unreasonable in light of the child's age and emotional disability.

Child Protective Services

1. Tenenbaum v. Williams, 862 F. Supp. 962 (E.D.N.Y 1994).

   A kindergarten student allegedly told her teacher that her father had sexually abused her. As required by law, the teacher made a report to the building principal who, in turn, made a report to the Department of Social Service ("DSS") Central Register of Child Abuse and Maltreatment. DSS effected an emergency removal of the girl from her New York City school. Following a hospital examination which revealed no evidence of sexual abuse, the report was marked unfounded and the girl was returned to her parents. The parents sued DSS and the New York City Board of Education. Among other things, they claimed that the removal of the girl from school constituted a seizure in violation of her Fourth Amendment rights.

   The court held that DSS was not liable. Removal of a child from school for protective services requires probable cause and either a warrant or an emergency. Like the police, (and unlike school teachers and administrators), DSS' personnel routinely conduct investigative searches and seizures and so are held to a higher standard. The girl's statements to her teachers constituted probable cause and justified her emergency removal by DSS. The Board of Education was also not liable. It merely permitted DSS to carry out its lawful responsibilities and had no authority to prevent the girl's removal from the school.

2. Wojeck v. Town of North Smithfield, 76 F.3d 1 (1st Cir. 1996).

   School officials did not violate the Fourth Amendment prohibition against unreasonable seizures when they transported one child to the school of her sibling so that they could be interviewed together in connection with an investigation of a possible child abuse report.

3. Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994).

   A nine-year-old student was taken to the principal's office to be interviewed about suspected sexual abuse. The court held that even if the situation could be called a seizure, it was a reasonable one. The seizure was justified at its inception because the victim had identified her abuser. The 10-minute interview was reasonably related to the scope of determining the child's role in the incident.

4. Picarella v. Terrizzi, 893 F. Supp. 1292 (M.D. Pa. 1995).

   A school principal and several other school administrators removed a child from class and questioned her in a private office regarding possible physical abuse at home. A report was made and later found to be unfounded. Among other things, the student's parents claimed that the questioning violated her right to be free from an unreasonable seizure under the Fourth Amendment. The court rejected this claim and held that the school employees were not liable. As would be the case in New York, the school employees were mandated reporters under state law. The court reasoned that a person who is required by law to report a suspected case of child abuse must have the freedom to ask questions of the possible victim. Therefore, the seizure was reasonable.

APPLICATION OF THE EXCLUSIONARY RULE IN STUDENT DISCIPLINARY PROCEEDINGS

1. Matter of Juan C., 89 N.Y.2d 659 (1977).

   See discussion at page 18-19.

2. Thompson v. Carthage School Dist., 87 F.3d 979 (8th Cir. 1996).

   School officials found crack cocaine in a student's pocket while searching for a knife. The court held that the search was reasonable and that the exclusionary rule did not apply in student disciplinary proceedings.

3. James v. Unified School Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995).

   A police officer and a school official searched a student's car following an anonymous tip that a student had a gun on school premises. A gun was discovered and the student was expelled. The student then brought a civil rights action against the district. The court held that even assuming that the student's Fourth Amendment rights had been violated, the district was not prohibited from using the fruits of that violation in a school disciplinary proceeding.

Roemer Wallens
& Mineaux LLP
Counsellors at Law

ADA: DISABILITY AND REASONABLE ACCOMMODATION

There are mental or physical conditions that might or might not be considered to be a disability at first glance. The decisions have not been consistent and the rulings have all been given only for the particular case at hand. The majority of cases are decided on a particularized set of facts and the decision is based on whether the particularized condition rises in severity to substantially limit a major life activity.

DISABILITY

Diabetes: In EEOC v. Chrysler Corp., 917 F.Supp. 1164 (E.D.Mich.1996), the plaintiff, alleged that the defendant's refusal to hire based on a pre-employment medical examination violated the ADA. The Court agreed and held that Chrysler's blanket exclusion from employment of individuals with high blood sugar levels violated the ADA. See also, Deckert v. City of Ulysses, 1995 U.S.Dist. LEXIS 14526 (D.Kan.1995).

However, in Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437 (1996), the court stated "[I]f an insulin dependent diabetic can control her condition with the use of insulin or a near sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition." The court further held that the "[P]laintiff must show that her diabetes substantially limits her in a major life activity by showing that it affects her in fact, rather than how it would affect her hypothetically if she were unable to obtain insulin."

Breast Cancer: Bipolar disorder, back problems, heart disease and many kinds of cancer may be inactive for long periods before re-emerging. Such episodic conditions are covered disabilities, according to the EEOC, if, when active, they substantially limit a life activity.

However, the 5th U.S. Circuit Court of Appeals recently suggested otherwise. In Ellison v. Software Spectrum, Inc., 1996 U.S.App. LEXIS 12537 (5th Cir.1996), the Court held that a woman with breast cancer did not have a disability. The Court stated that even though Ellison's ability to work was affected by breast cancer (i.e. work schedule adjustment, nausea and sluggishness from radiation), she failed to show substantial limitation in the major life activity of working.

Carpal Tunnel Syndrome: Carpal tunnel syndrome affects the hands, wrists, a person's dexterity and motor skills, making grasping tools or typing quite painful to an afflicted person. In Smith v. Kitterman, Inc., 897 F.Supp.423 (W.D. Mo. 1995), the Court refused to dismiss the cause without finding out first whether Smith's impairment limited a major life activity. See also, Taylor v. Gilbert I. Bennett, 1996 U.S. Dist. LEXIS 12729 (1996). A plaintiff must present evidence not only that he or she has carpal tunnel syndrome, but also that it is more than an inconvenience or slightly limiting. For example, in Fink v. Kitzman, 881 F. Supp. 1347 (N.D. Iowa 1995), the Court found that an employee's carpal tunnel syndrome did not preclude her from performing the essential functions, even without accommodations.

Heart conditions: Heart conditions do not automatically constitute a covered disability because their severity varies from individual to individual.

In Czopek v. General Electric Co., 1995 U.S. Dist. Lexis 8607 (N.D. Ill. 1995), the employee lost because he did not show any actual limitations due to his heart condition, or that the employer perceived him as having a disability. The fact that the employee was working after his termination proved to the Court that he was not substantially limited in working.

Additionally, in Kiess v. D&H Distributing Company, 1996 U.S. Dist. LEXIS (1996), the court held that although "it is undisputed that the plaintiff has a heart condition, but it only restricts heavy lifting activity. It does not constitute a disability for ADA purposes. The inability to perform a particular job, such as plaintiff's kitchen installer job, does not amount to a qualifying disability sufficient to make out a prima facie case under the ADA. Otherwise, everyone with a workers compensation case that kept him or her from returning to work would be disabled."

In Oswalt v. Sara Lee, 889 F.Supp. 253 (N.D. Miss. 1995), aff'd; 74 F.3d a1 (5th Cir. 1996), the effects of high blood pressure were so slight and the situation so controlled that the impairment was not found to be substantial. Another predicament a plaintiff might have is that his/her condition may be so impairing as to render him or her unable to perform the essential duties of the job and thus, unqualified and unprotected by the ADA. [See, Tyson v. New York State Department of Correctional Service, 604 N.Y.S.2d 130 (1993)]

However, severe heart conditions will pass summary judgment muster if the plaintiff can provide enough evidence to show that s/he has a major life activity substantially limited to the extent that there remains a genuine issue of material fact.

Obesity: In its guidance on the term "disability", the EEOC states that "being overweight, in and of itself, generally is not an impairment ... on the other hand, severe obesity, which has been defined as body weight more than 100% over the norm is clearly an impairment." However, employers legitimate height and weight requirements for positions have been upheld, particularly where obese employees could not show they were perceived as having a disability. [See, Snow v. Virginia Department of State Police, 862 F. Supp. 1469 (E.D. Va. 1994), and Wolf v. Frank, 1994 U.S. Dist. LEXIS 10356 (E.D. Mich. 1994), aff'd, 1995 U.S. App. LEXIS 5471 (6th Cir. 1995)].

In a recent decision, entered on December 31, 1996 by the Appellate Division of the State Supreme Court, the Court held that under New York and federal law, "employers are entitled to impose rules and regulations governing the appearance of their employees." The Court agreed that "obesity" is a disability, but warned of the difference between "obesity" and "overweight". The Court reasoned the plaintiffs, 10 flight attendants whose employment was terminated because they did not meet

Delta Airlines height and weight standards, did not show they "are medically incapable of meeting Delta's weight requirements due to an underlying medical problem." See, Delta Airlines, Inc. v. New York State Division of Human Rights, et al, 1996 N.Y. App. Div. LEXIS 12963, (Dec. 31, 1996, 1st Dept.)

Back Problems: Back problems have been the most commonly cited impairment in ADA complaints filed with the EEOC. Courts seem to rule that back conditions are not covered disabilities in cases where it is determined that he/she either doesn't have a substantial impairment or cannot perform all essential job functions; [See, City of Pittsburgh v. Human Relations Commission, 630 A.2d 919 (1993)].

Migraine Headaches: Some courts have been more liberal with the definition of disability. At least one court has held that a plaintiff had arguably shown that her migraine headaches were a covered disability that affected her neurological and vascular systems. (See, Carlson v. InaCom Corp., 885 F. Supp. 1314 (D. Neb. 1995).

Vision Requirements: The U.S. District Court for the Eastern District of New York has held that a police department can maintain vision requirements without necessarily regarding applicants who cannot meet them as disabled. The Suffolk County, NY, police department rejected the plaintiff's job application after he passed the civil service exam because he did not meet its requirements for uncorrected visual activity. The court held that the vision requirement was arguably necessary given the potentially dangerous situations in which police officers may be involved. Further, the court suggested that the need for eyeglasses are not impairments because they are common place and "the very concept of an impairment implies a characteristic that is not common place." Joyce v. Suffolk Count, 911 F.Supp. 92 (E.D.N.Y.1996); and, Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)

Bladder Condition: In Rouch v. Weaster, Inc., 8 NDLR para. 338 (6th Cir. 1996)(No. 95-3738), the Court of Appeals for the 6th Circuit concluded the employee offered sufficient evidence to raise a question of fact as to whether her bladder condition substantially interfered with her ability to work and reversed the district court's summary judgment in favor of the defendant.

Pregnancy Related Complications: Pregnancy related complications can be a disability under the ADA. In Cerrato v. Durham, 941 F.S.upp. 388 (S.D.N.Y.1996), the employee experienced nausea and dizziness, spotting, and leaking which forced her to miss five (5) days over a one month span. She was discharged for excessive absenteeism. The court denied the defendant's Motion to Dismiss the ADA claims, stating the employee alleged she could have performed her essential job responsibilities, and that the employer accommodated other similarly situated employees.

Reflex Sympathetic Dystrophy: In Kubsch v. National Standard Company, 1995 U.S.Dist. LEXIS 16363 (N.D.Ind.1995), the plaintiff was injured at work and began receiving treatment and benefits through workers compensation. After failing to undergo recommended treatment, and failing to return to work, she was terminated. Plaintiff alleged she was terminated on the basis of her reflex sympathetic dystrophy. The court dismissed the complaint holding that the plaintiff did not have a mental or physical impairment that substantially limited a major life activity. Moreover, the employer had a legitimate reason for termination - failure to work or continue medical treatment - that the plaintiff did not show to be pretextual.

Thyroid Cancer: In Demming v. Housing and Redevelopment Authority , 665 F.3d. 950 (8th Cir. 1995), the court held that the plaintiff failed to show that the thyroid cancer limited a major life activity, and that her employer discriminated against her based on a disability. The court found that the employee had work performance problems unrelated to her thyroid cancer.

Hemophilia: The court in Bridges v. City of Bossier, 1996 U.S.App. LEXIS 21764, 92 F.3d 329 (1996), held that hemophilia is not a disability per se. The court stated "the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment that person has, but rather in the effect of that impairment on the life of the individual."

AIDS/HIV Positive: The Fourth U.S. Circuit Court of Appeals held that being infected with HIV is not presumptively a disability as per EEOC guidelines. In Ennis v. National Association of Business and Educational Radio, Inc., 53 F.3d 55 (4thCir.1995), the court held judges should determine on an individual basis whether HIV infection substantially limits a person's ability to perform a major life activity. The plaintiff adopted a child infected with the HIV virus. The plaintiff claimed that she was terminated because her employer, NABER, didn't want to pay the medical bills for her adopted son. The employer contended her work performance was inadequate. The court concluded that being asymptomatic HIV positive is not per se a disability. "A case-try-case determination of whether a given impairment substantially limits a major life activity, or whether an individual is being perceived as having such a substantially limiting impairment must be made."

Emerging Issues: An interesting consideration is the interplay between an individual's application for disability benefits and that same person's complaint of employment discrimination. Several courts have held an individual can not claim s/he is disabled and unable to do the job, and at the same time claim s/he is qualified individual with a disability capable of performing the essential functions of the job.

In McNemar v. Disney Stores, 1995 U.S.Dist. LEXIS 9454 (E.D.Pa.1995), aff'd 1996 U.S.App. LEXIS 18902 (3d Cir.1996), a federal district court rejected the plaintiff's contention that the ADA protected him because he was qualified to work. It noted he claimed on an application for Social Security disability benefits that he was totally disabled and unable to work because of his disability, AIDS. Yet, he was also asserting - to support the ADA contention - that he could work. The court said you cannot have it both ways.

In contrast to McNemar is Smith v. Dovenmuchle Mortg. Inc., 1994 U.S. Dist. LEXIS 8179 (N.D. Ill. 1994), where the court stated making an individual choose between employment discrimination and disability benefits would, according to the court, conflict with the purposes of the ADA.

Until this issue is put to a definitive rest, both employers and employees must realize that if employees apply for benefits (e.g., workers compensation, disability, rehabilitation, or Social

Security) statements on applications about inability to work may come back to destroy or bolster an ADA case.

In conclusion, the EEOC and the courts have been attempting to further define what does or does not constitute a "disability". Not all conditions rise to the protected status of disability and even if traditionally the impairment has been considered a "disability", the nature of the individual's impairment and the job involved in a particular case may serve as mitigating factors to disprove a discrimination claim.

REASONABLE ACCOMMODATION

Reasonable accommodation is a initial component of the ADA's assurance of nondiscrimination. Reasonable accommodation is any change in the work environment or in the way things are usually done that results in an equal employment opportunity for an individual with a disability.

Although employers should have a policy on granting reasonable accommodations to employees with disabilities, they should also keep such policies informal and flexible. The employer should first assess whether the employee requesting an accommodation has a disability under the ADA. Secondly, the employer should assess whether the employee is "otherwise qualified" for the job. A person is "otherwise qualified" under the ADA if s/he "satisfies the requisite skill, experience, and education requirements of the employment position such individual holds or desires, and who with or without a reasonable accommodation, can perform the essential functions of the job. Finally, employers should determine whether providing such accommodation would impose an "undue hardship". Factors used to determine "undue hardship" are: "the nature and net cost"; "the overall financial resources of the facility"; the employer's operations, including workforce composition, structure, and functions of the workforce; and, the impact the accommodation would have on the employer's operations. In general, an "undue hardship" means the accommodation would require "a fundamental alteration in the employer's business." To assist in the determinations during all three stages the EEOC has established a help-line for employers to call. It is the Job Accommodation Network (JAN) at 1-800-526-7234.

As the EEOC has noted, an employer is not required to provide an accommodation if it is unaware of the need. Generally, an employee must tell the employer that an accommodation is needed. If an employee with a known disability is not performing well, the employer should consider whether this is due to a disability. The employer may inquire at anytime whether the employee needs an accommodation. Further, if an accommodation is requested but the need for it is not obvious or the employer does not believe the accommodation is needed, the employer may request documentation of the individual's functional limitations to support the request. After such documentation is received, the employer should at least make a "good faith effort" to give an accommodation, otherwise, a court could assess punitive damages.

Undue Hardship - Economic: In Garza v. Abbott Laboratories, 1996 U.S. Dist. LEXIS 13520 (N.D. Ill. 1996), the U.S. District Court for the Northern District Illinois held a company that denies an accommodation because it over estimated its cost still may be sued under the ADA, even if the estimate was reached in "good faith". The court held, "we cannot find any cases authorizing Abbott's attempt to apply a subjective good faith standard to the employer's determination of what accommodations are reasonable.

Workers Compensation and ADA: In September 1996, the EEOC issued new guidance on the ADA and workers compensation laws. The EEOC proclaimed that workers compensation costs may not be used to justify adverse employment actions against individuals with disabilities. "Where an employer refuses to hire a person because it assumes, correctly or incorrectly, that, because of a disability, s/he poses merely some increased risk of occupational injury (and, therefore, increased workers compensation costs), the employer discriminates against that person the basis of disability. The EEOC guidance cautions employers that workers compensation concerns and determinations do not supersede ADA mandates. The ADA prohibits an employer from discharging covered, injured employees who are temporarily unable to work where it would not impose an undue hardship to provide leave as a reasonable accommodation.

Temporary Light Duty: If an employer has a light duty job that is temporary or limited in time, it is not required under the ADA to make that a permanent job for someone with a disability.

Reassignment: The EEOC has noted that "in general, reasonable reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship."

Courts have looked favorably upon an employer's offer of part-time and even flex-time employment. However, employers do not have to retrain an employee for a position which s/he is not qualified. See, Riley v. Weyerhaeuser Paper Co., 898 F.Supp. 324 (W.D.N.C.1995), aff'd in part and appeal dismissed in part without opinion, 77 F.3d 470 (4th Cir. 1996).

In Emuik v. Libbey Owens Ford Co., 785 F.Supp. 393 (E.D.Tex.1995), the court held the duty to reassign does not extend to vacant positions at other facilities if the employer does not routinely transfer employees among sites. However, in direct contradiction, in Gile v. United Airlines, Inc., 1996 U.S.App. LEXIS 27503 (7th Cir. 1996), the court held that reassignment as a form of accommodation can encompass reassignment to a completely different position at the same location. But, the employer does not have to "bump" (i.e. remove another employee from a job to provide reassignment) another employee as a reasonable accommodation. See, Eckles v. Consolidated Rail Corp., 1995 U.S.Dist. LEXIS 9568 (S.D.Ind.1995), aff'd, 1996 U.S App. LEXIS 20403 (7th Cir. 1996).

Location: With the telecommuting boom, the ability of employees to work at home has increased dramatically. Allowing an employee to perform essential job functions at home, when possible, is a reasonable accommodation. However, at least two appellate courts have asserted that in most jobs it will not be possible to perform essential job functions at home. The 7th U.S. Circuit Court of Appeals stated that "most jobs in organizations, public or private, involve team work under supervision rather that solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. See, Vande Zande v. Wisconsin Department of Administration, 851 F.Supp. 353

(W.D.Wis.1994), aff'd, 44 F.3d 538 (7th Cir.1995) . Additionally, in Tyrdall v. National Education Centers, 31 F.3d 209 (4th Cir.1994), the 4th U.S. Circuit Court of Appeals stated, "except in the unusual case where an employee can effectively perform all work-related duties at home, an employee "who does not come to work cannot perform any of his job functions, essential or otherwise."

Work Schedule Modification: To deny a more flexible work schedule, an employer must show that the modified schedule would be an "undue hardship".

In Heise v. Genuine Parts Co., 900 F. Supp. 1137 (D. Minn. 1995), the court held that an employer would be "somewhat disingenuous" to list flexible hours as a job requirement, and then claim giving an employee a flexible work schedule an undue hardship.

Employers should realize that including a flexible hour requirement in a job description will possibly force them to accept a flexible hour employee work schedule as a reasonable accommodation.

Leave of Absence: An employer may have to adjust its leave policy as a reasonable accommodation. The employer may have to allow the use of accrued leave, advanced leave, or leave without pay. Leave may be used as a reasonable accommodation up to the point of undue hardship. The obligation to give leave does not mean leave for an indefinite period of time. In Peques v. Emerson Electric, 913 F. Supp. 976 (N.D. Miss. 1996), the court held "although it is reasonable for an employer to allow temporary leave of absence to recuperate from a disability injury, the court does not believe the ADA requires the employer to extend that leave indefinitely."

Employers should use common sense when accepting leave as a reasonable accommodation. If an employee requests leave as a reasonable accommodation, the employer must make a "good faith" effort to determine if leave is necessary. The results of automatically determining leave is inappropriate, or worse yet, terminating the employee for taking leave to recuperate will most likely prove disastrous. In Corbett v. National Products, 1995 U.S.Dist. LEXIS 6425 (E.D. Pa. 1995), a court held the employer violated the ADA by failing to provide a former employee with a leave of absence to seek treatment for alcoholism, and firing him for seeking treatment. He was awarded nearly $190,000.00 in damages and more than $150,000.00 in attorney's fees.

In summary, an employer that does a comprehensive review and makes a "good faith" effort to offer workable accommodations should prevail. The employer should stress an ongoing relationship with the employee to determine if the employee needs have changed, and if so, will the allegedly needed change cause undue hardship. Of course, the employer should record all documentation concerning an employee's disability and all related issues. The documentation will provide evidence in the employer's favor for possible future disputes. In general, an employer should approach every situation with an open mind, accurately assessing all requests in "good faith", and record everything. The inconveniences associated with these policies will save enormous amounts of time and money in the future.

JLF/lbr

Roemer Wallens
& Mineaux LLP
Counsellors at Law

AMERICANS WITH DISABILITIES ACT OVERVIEW
BY LIESL K. ZWICKLBAUER

The Americans with Disabilities Act ("ADA") was signed into law by President Bush on July 26, 1990. The ADA prohibits unlawful discrimination against qualified individuals having a disability with respect to selection for employment or promotion, termination and layoff, compensation and fringe benefits, training and other terms and conditions of employment. With respect to employers with 25 or more employees, the provisions of the ADA took effect in 1992. Interestingly, although the ADA covers Congress and other legislative agencies, the Federal Government and Federal Corporations, Indian tribes and bonafide tax exempt private membership clubs are excluded from coverage.

The ADA was designed to prevent and prohibit unlawful discriminatory action against "**otherwise qualified**" individuals having a disability. Unless an employer claims an "undue hardship" the employer is obligated to make a "**reasonable accommodation**" so that a disabled individual can perform the "**essential functions**" of the job. In determining whether an individual is a qualified individual with a disability and may be entitled to a reasonable accommodation, it is important to know the definitions of the ADA "buzz" phrases.

An applicant or current disabled employee is deemed to be **a qualified individual** when, with or without **reasonable accommodation**,

> the individual can perform the **essential functions** of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description should be considered evidence of the essential functions of the job. (Title I, Section 101.(8)).

If it is discovered that a potential employee is disabled, the employer must attempt to provide **reasonable accommodation** to the **otherwise qualified individual**. The fact that the qualified individual needs reasonable accommodation cannot be held against them. Under Title I Section 101(a), **reasonable accommodation** is

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The only exception to providing **reasonable accommodation** is if and when the employer can make a showing that the accommodation would place an **undue hardship** on the employer and/or operation of the business. An **undue hardship** could be

> "an action which is unduly costly, extensive, substantial, disruptive or one that will fundamentally alter the nature of the job (from Congressional Committee Report)."

Who is disabled? The ADA covers anyone with any physical or mental impairment that substantially limits "a major life activity" such as caring for oneselve, walking, seeing, hearing, speaking, breathing, learning and working. This is not an exhaustive list. It includes an individual with a record of such physical or mental impairment and an individual who is regarded as having such an impairment.

The term disability excludes those who are current drug users or have a mental disorder resulting from current drug use; homosexuality; bisexuality; transsexuality; transvestitism; sexual behavior disorders such as voyeurism, gender identity disorders not resulting from physical impairments; compulsive gambling; kleptomania or pyromania. The ADA also does not cover temporary disabilities, i.e. a broken leg.

Four Federal agencies have been designated with the responsibility to implement and enforce the ADA: the Justice Department, the Transportation Department, the Federal Communications Commission and the EEOC. Questions regarding the ADA may also be directed to the ADA information line at (202) 514-0301.